

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

039
JOINT APPENDIX

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,180

JAMES RIVER BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

SUFFOLK BROADCASTERS,
KFAB BROADCASTING COMPANY,
Intervenors.

**APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION**

Washington, D. C. - THIEL PRESS - 202 - 363-0825

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 1 1967

Nathan J. Paulson
CLERK



(i)

TABLE OF CONTENTS

	Record Page	JA Page
Prehearing Stipulation		1
Prehearing Order		3
Letter of transmittal and Application of James River Broad- casting Corporation, rec'd May 27, 1966	148	4
Petition to Reject Application, filed on behalf of KFAB Broadcasting Company, rec'd Aug. 16, 1966	242	8
Letter of transmittal and Amendment to Application of James River Broadcasting Corporation, rec'd Aug. 19, 1966	246	11
Opposition to Petition to Reject Application, filed on behalf of James River Broadcasting Corporation, rec'd Aug. 19, 1966	275	14
Reply to Opposition, filed on behalf of KFAB Broadcasting Company, rec'd Aug. 30, 1966	277	16
Commission letter to Lauren A. Colby, mailed Nov. 2, 1966 ...	283	20
Commission letter to KFAB Broadcasting Company, mailed Nov. 2, 1966	284	22
Petition for Reconsideration and Reinstatement of Applica- tion NUNC PRO TUNC as of May 31, and for Other Re- lief, filed on behalf of James River Broadcasting Corpora- tion, rec'd Nov. 30, 1966	285	23
James River Broadcasting Corporation's ERRATUM to its Petition for Reconsideration and Reinstatement of Appli- cation Nunc Pro Tunc as of May 31, 1966, and for Other Relief, rec'd Dec. 1, 1966	307	45
Letter to Commission on behalf of James River Broadcasting Corporation, rec'd Dec. 1, 1966	309	46
Statement by KFAB Broadcasting Company, rec'd Dec. 12, 1966	311	47
James River Broadcasting Corporation's Response to "State- ment by KFAB Broadcasting Company", rec'd Dec. 19, 1966	314	50

(ii)

Opposition to Petition for Reconsideration and for Other Relief, filed on behalf of Charles E. Springer, rec'd Dec. 21, 1966	318	53
Virginia Broadcasters Opposition, rec'd Dec. 23, 1966	327	61
James River Broadcasting Corporation's Reply to Opposition of Charles E. Springer, rec'd Jan. 9, 1967	336	67
James River Broadcasting Corporation's Reply to Virginia Broadcasters Opposition, rec'd Jan. 13, 1967	343	73
Commission Memorandum Opinion and Order designating Applications for Hearing, released July 31, 1967	350	80

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES RIVER BROADCASTING
CORPORATION

Appellant,

v.

Case No. 21,180

FEDERAL COMMUNICATIONS
COMMISSION

Appellee,

SUFFOLK BROADCASTERS

Intervenor.

PREHEARING STIPULATION

The parties to the above appeal have entered into a stipulation stating that the following questions are those presented for the instant appeal:

1. Where Appellant's application for a new radio station in Norfolk, Virginia, was timely filed prior to a "cut off date" published by the Federal Communications Commission, but through error failed to provide adequate protection from electrical interference to a radio station in Omaha, Nebraska, and where said error was cured by an amendment filed after the cut off date, whether the Federal Communications Commission acted arbitrarily and capriciously in dismissing said application.*
2. Where Appellant's above-described application was mutually exclusive with two other competing applications for radio stations in Williamsburg, Virginia, and Suffolk, Vir-

*Intervenor reserves the right to argue that the amendment did not cure the error.

ginia, whether the Commission erred in dismissing Appellant's application and refusing to make Appellant a party to the hearing proceedings involving the Williamsburg and Suffolk applications.

FILING OF JOINT APPENDIX

Counsel for the parties further stipulates that the joint appendix will be filed simultaneously with the filing of the reply brief, or if Appellant files no reply brief, then within 15 days of the filing of the brief of Appellee.

References to the record appearing in the various briefs of the parties shall be to the page numbers in the original record certified to this Court. In the printing of the joint appendix there will be set forth, in addition to the consecutive numbering of the pages of the joint appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the brief.

Respectfully submitted,

Lauren A. Colby
Counsel for Appellant

John J. Conlin
Counsel for Appellee

William P. Bernton
Counsel for Intervenor

October 5, 1967

JA 3

PREHEARING ORDER

Before: Burger, Circuit Judge,
in Chambers.

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

JA 4

[148]

LAUREN A. COLBY
Attorney at Law
930 F Street, N.W.
Washington, D.C. 20004

May 27, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Waple:

On behalf of my client, James River Broadcasting Corporation, I hand you herewith for filing, in triplicate, an application on FCC Form 301, for a construction permit for a new standard broadcast station to operate on the frequency 1110 kc, 50 kilowatts power, daytime only, at Norfolk, Virginia.

In accordance with the Commission's requirements, the application is accompanied by a check in the sum of \$75.00 in payment of the filing fee. The application is also accompanied by two extra copies of Section V-G of Form 301, and notice of the application is being forwarded to the Federal Aviation Agency on FAA Form 117.

Should there be any questions concerning the enclosed application, please communicate with the undersigned.

Sincerely,

/s/ Lauren A. Colby

Enclosure.

JAMES RIVER BROADCASTING CORPORATION

NORFOLK, VIRGINIA

INTRODUCTION:

This Engineering Exhibit has been prepared on behalf of the James River Broadcasting Corporation, applicant for a new standard broadcast station to operate at Norfolk, Virginia on 1110 kilocycles, with a power 50,000 watts, daytime only, with a directional antenna system.

This application will not create nor receive interference from any known existing or proposed radio broadcast station, with the exception that this application is mutually exclusive with an application on 1110 kilocycles for Williamsburg, Virginia (BP-16829).

Answers to paragraphs in FCC form 301, Sections V-A and V-G, which are not directly shown thereon, are contained in the following Figures 1 through 35.

* * *

201

Figure 1 Page 2

V. ALLOCATION PROBLEM:

The proposed Norfolk operation will not cause prohibitive overlap with any known existing or proposed radio station, with the exception of an application on 1110 kilocycles for Williamsburg, Virginia (BP-16829) which is mutually exclusive with this application. The attached Figure 28 illustrates the pertinent contour of cochannel and adjacent channel

stations, and as will be noted, the application complies with Section 73.37 of the FCC Rules regarding minimum separations between stations.

The allowable critical hour skywave radiation toward WBT, 1110 kilocycles, Charlotte, N. C., a class I-B station, is tabulated below:

Bearing Degrees	Distance to WBT 0.1 mv/m Miles	Allowable Radiation mv/m	Vertical Angle Degrees	Proposed Norfolk Maximum Radiation in Vertical Angle Sector MEOV-mv/m
217	240	258.2	0-31	165
230	152	209.9	0-45	112
241	133	197.3	0-49	100
255	138	197.5	0-48	92.9
267	170	206.4	0-42	143

This application complies with section 1.569 of the FCC Rules.

202

Figure 2

JAMES RIVER BROADCASTING CORPORATION
NORFOLK, VIRGINIA

TABULATION OF AZIMUTHS, RADIATIONS AND CONDUCTIVITIES:

1) Proposed Norfolk, Virginia - 1110 KC. 50 KW. DA-D

Azimuth: N 0° E through N 350° E in 10° increments

Radiation: Proposed pattern, Figure 5

Conductivity: Figure M-3

2) STATION WBT, CHARLOTTE, NORTH CAROLINA, 1110 KC. 50 KW. DA-N

Azimuth: N 20° E through N 150° E in 10° increments

Radiation: 233 mv/m/kw

Conductivity: Figure M-3

- 3) PROPOSED WWS, EVERETT, PA. (BP-16325), 1110 KC, 5 KW, D
Azimuth: N 90° E through N 260° E in 10° increments
Radiation: 187 mv/m/kw
Conductivity: Figure M-3
- 4) PROPOSED WHIM, PROVIDENCE, R. I., 1110 KW, 1 KW, D
Azimuth: N 200° E through N 230° E in 10° increments
Radiation: 272 mv/m/kw
Conductivity: Figure M-3
- 5) Proposed WNAR, Norristown, Pa. (BP-12902), 1110 KC, 50 KW, DA-D
Azimuth: N 160° E through N 300° E in 10° increments
Radiation: Proposed directional pattern
Conductivity: Figure M-3

203

Figure 2 Page 2

- 6) STATION WHLI, HEMPSTEAD, NEW YORK, 1120 KC, 10 KW, DA-D
Azimuth: N 195° E through N 205° E in 10° increments
Radiation: Measured directional pattern
Conductivity: Figure M-3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

RECEIVED

AUG 16 1966

OFFICE OF THE SECRETARY
BROADCAST FACILITIES
DIVISION

AUG 18 1966

Delivered
5-27-66

In re Application of

JAMES RIVER BROADCASTING CORPORATION)
Norfolk, Virginia)

BP-

For Construction Permit)
(1110 kc, 50 kw, DA-D Daytime))

PETITION TO REJECT APPLICATION

KFAB Broadcasting Company, licensee of Class I-B Station
KFAB, Omaha, Nebraska (1110 kc, 50 kw, U, DA-N), for reasons
set forth in the attached engineering statement incorporated
herein by reference, asks that the above-captioned application be
returned to the applicant forthwith as contravening Rule 73.37 and
Rule 73.187.

As shown by the attached engineering affidavit, the above-
captioned application listed as tendered on the Commission's re-
leases of June 3, 1966 (Report No. 7805) fails to protect KFAB's
ground wave 0.1 mv/m normally protected contour during critical
hours in contravention of Rule 73.187. Accordingly, the application
should be returned forthwith, under Rule 73.37, without being
assigned a file number.

Respectfully submitted,

KFAB BROADCASTING COMPANY

By /s/ Vernon L. Wilkinson
Vernon L. Wilkinson

McKenna & Wilkinson
1705 DeSales Street, N. W.
Washington, D. C. 20036

August 16, 1966

Its Attorney

ENGINEERING REPORT

213

SILLIMAN, MOFFET & KOWALSKI
CONSULTING RADIO ENGINEERS

1405 G STREET, N.W.

WASHINGTON, D. C. 20005

KFAB
OMAHA, NEBRASKAENGINEERING STATEMENT

1. THE WRITER IS CONSULTING ENGINEER TO RADIO STATION KFAB, OMAHA, NEBRASKA. KFAB IS A CLASS 1-B STATION OPERATING ON 1110 Kc/s WITH 50 KW-U-DAN. THIS STATEMENT SUPPORTS KFAB'S OPPOSITION TO THE BELOW DESCRIBED APPLICATION.

2. AN APPLICATION WAS RECENTLY FILED WITH THE FCC BY JAMES RIVER BROADCASTING CORPORATION (JRB) PROPOSING TO UTILIZE 1110 Kc/s WITH 50 KW-DA DAYS AT NORFOLK, VIRGINIA.

3. THE ENGINEERING INFORMATION FOR THE JRB APPLICATION WAS SIGNED BY WILLIAM E. BENNS III UNDER DATE OF MAY 25, 1966.

4. THE DIRECTIONAL ANTENNA PROPOSED BY THIS APPLICATION FAILS TO PROTECT KFAB'S GROUND WAVE 0.1 MV/M NORMALLY PROTECTED CONTOUR DURING CRITICAL HOURS AS IS REQUIRED BY THE FCC RULES, PARAGRAPH 73.187.

5. AT AN AZIMUTH OF APPROXIMATELY N 291.5° E KFAB'S 0.1 MV/M GROUND WAVE CONTOUR LIES APPROXIMATELY 832 MILES FROM JRB'S TRANSMITTER SITE. USING THE METHODS OF 73.187, JRB WOULD BE REQUIRED TO RESTRICT RADIATION TO APPROXIMATELY 546.0 MV/M AT THAT AZIMUTH THROUGH A VERTICAL ARC FROM THE HORIZONTAL TO 7° ABOVE THE HORIZONTAL.

6. THE CALCULATED HORIZONTAL RADIATION PATTERN PROPOSED BY JRB SHOWS A CALCULATED FIELD IN EXCESS OF 600 MV/M AT THIS AZIMUTH. HENCE, THE PROPOSAL IS CLEARLY IN VIOLATION OF 73.187 AND THE FAILURE OF THE APPLICANT'S ENGINEER TO PROVIDE ADEQUATE ADDITIONAL MEOV VALUES IN THIS DIRECTION ABOVE THE CALCULATED VALUES IS ACADEMIC FOR THE PURPOSES OF THIS STATEMENT.

7. ALL DATA AND INFORMATION CONTAINED HEREIN, OR ON WHICH THIS STATEMENT IS BASED, WAS OBTAINED IN EXACT ACCORDANCE WITH THE PERTINENT REQUIREMENTS OF THE FCC RULES AND/OR ESTABLISHED ENGINEERING PRACTICE, UNLESS OTHERWISE SPECIFICALLY SO STATED.

ENGINEERING REPORT

SILLIMAN, MOFFET & KOWALSKI
CONSULTING RADIO ENGINEERS

1408 G STREET, N.W.

WASHINGTON, D. C. 20005

KFAB
OMAHA, NEBRASKA

A F F I D A V I T

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

JOHN A. MOFFET, BEING DULY SWORN UPON OATH DEPOSES AND SAYS:

THAT HIS QUALIFICATIONS ARE A MATTER OF RECORD WITH THE FEDERAL COMMUNICATIONS COMMISSION;

THAT HE IS A REGISTERED PROFESSIONAL ENGINEER IN THE DISTRICT OF COLUMBIA AND IS A PARTNER IN THE FIRM OF SILLIMAN, MOFFET AND KOWALSKI;

THAT THIS FIRM HAS BEEN RETAINED BY KFAB BROADCASTING COMPANY, LICENSEE OF KFAB, TO PREPARE THIS ENGINEERING STATEMENT;

THAT HE HAS EITHER PREPARED OR DIRECTLY SUPERVISED THE PREPARATION OF ALL TECHNICAL INFORMATION CONTAINED IN THIS ENGINEERING STATEMENT AND THAT THE FACTS STATED IN THIS ENGINEERING STATEMENT ARE TRUE OF HIS KNOWLEDGE EXCEPT AS TO SUCH STATEMENTS AS ARE HEREIN STATED TO BE ON INFORMATION AND BELIEF AND AS TO SUCH STATEMENTS HE BELIEVES THEM TO BE TRUE.

/s/ JOHN A. MOFFET
JOHN A. MOFFET

SUBSCRIBED AND SWORN TO BEFORE ME THIS 4TH DAY OF AUGUST, 1966.

/s/ GRETCHEN LEAPLEY
NOTARY PUBLIC

MY COMMISSION EXPIRES APRIL 30, 1971.

(SEAL)

LAUREN A. COLBY
ATTORNEY AT LAW
~~XXXXXXXXXX~~ 1334 G St., N.W.
WASHINGTON, D. C. 20004
DISTRICT 7-0234

EXHIBIT COPY

216

RECEIVED

AUG 19 1966

F. C. C.
OFFICE OF THE SECRETARY

August 19, 1966

8/20/66
Acceptable
LAC

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Waple:

On behalf of my client, James River Broadcasting Corporation, I hand you herewith for filing, in triplicate, an amendment to James River's pending application for a construction permit for a new standard broadcast station at Norfolk, Virginia.

The enclosed amendment reflects a very minor change in the applicant's engineering proposal, which has been made for the purpose of correcting a critical hours problem involving Standard Broadcast Station KFAB, Omaha, Nebraska.

Very truly yours,

Lauren A. Colby

Lauren A. Colby

LAC:pah

Enclosure

cc: Vernon L. Wilkinson, Esquire

217

Norfolk, Virginia
File No. _____

AMENDMENT TO APPLICATION OF
JAMES RIVER BROADCASTING CORPORATION
(For Construction Permit for New
Standard Broadcast Station)

OFFICE OF THE SECRETARY

AUG 19 1966

RECEIVED

To The Federal Communications Commission:

The above application is hereby amended by submission
of the attached engineering statement.

JAMES RIVER BROADCASTING CORPORATION

Barbara Bennis

Barbara Bennis, President

August 19, 1966

243

RECEIVED

AUG 19 1966

F.C.C.
OFFICE OF THE SECRETARY

Engineering Statement in Support of an
Amendment to the Application of James River
Broadcasting Corporation for a New Standard
Broadcast Station to Operate in Norfolk,
Virginia on 1110 Kilocycles with 50 KW, DA/D

* * *

Station KFAB, and the application of James River Broadcasting Corporation should be accepted for filing by the Commission. WHEREFORE, it is respectfully requested that the "Petition to Reject Application" filed in this proceeding by KFAB Broadcasting Company BE DISMISSED.

Respectfully submitted,

JAMES RIVER BROADCASTING CORPORATION

By 

Lauren A. Colby

1334 G Street, N.W.
Washington, D.C. 20005

August 19, 1966

CERTIFICATE OF SERVICE

I, Pat Hollins, do hereby certify that on this 19th day of August, 1966, I mailed, postage prepaid, by United States mail, copies of the foregoing "OPPOSITION TO PETITION TO REJECT APPLICATION" to:

Vernon L. Wilkinson, Esquire
McKenna & Wilkinson
1705 De Sales Street, N.W.
Washington, D.C. 20036
Counsel for KFAB Broadcasting Company


Pat Hollins

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

277
RECEIVED

AUG 30 1966

In re Application of)

JAMES RIVER BROADCASTING CORPORATION)
Norfolk, Virginia)For Construction Permit)
(1110 kc, 50 kw, DA-D Daytime))

OFFICE OF THE SECRETARY

File No. BP-

BROADCAST FACILITIES
DIVISION

SEP 1 1966

REPLY TO OPPOSITION

In a pleading filed August 16, 1966, KFAB Broadcasting Company asked that the above-captioned application be rejected for failing to protect KFAB's ground wave 0.1 mv/m contour during critical hours. In an opposition thereto, filed August 19, 1966, the applicant asserted that the deficiencies noted in KFAB's pleading had been cured by a concurrently filed amendment.

For reasons stated in the attached engineering affidavit, incorporated herein by reference, KFAB denies that the amendment removes the interference problems set forth in KFAB's original pleading, and accordingly repeats its request that the above-captioned application be rejected.

Respectfully submitted,

KFAB BROADCASTING COMPANY

By /s/ Vernon L. Wilkinson
Vernon L. WilkinsonMcKenna & Wilkinson
1705 DeSales Street, N. W.
Washington, D. C. 20036

August 30, 1966

Its Attorney

ENGINEERING REPORT

278

SILLIMAN, MOFFET & KOWALSKI
CONSULTING RADIO ENGINEERS

WASHINGTON, D.C. 20005

1405 G STREET, N.W.

KFAB
OMAHA, NEBRASKA

ENGINEERING STATEMENT

1. THE WRITER IS CONSULTING ENGINEER TO KFAB BROADCASTING COMPANY, LICENSEE OF NEBRASKA. KFAB IS A CLASS 1-B STATION OPERATING ON 1110 Kc/s WITH 50 KW-U-DAN. THIS STATEMENT SUPPORTS KFAB'S OPPOSITION TO THE BELOW DESCRIBED APPLICATION.

2. AN APPLICATION WAS RECENTLY FILED WITH THE FCC BY JAMES RIVER BROADCASTING CORPORATION (JRB) PROPOSING TO UTILIZE 1110 Kc/s WITH 50 KW-DA DAYS AT NORFOLK, VIRGINIA.

3. THE ORIGINAL ENGINEERING INFORMATION FOR THE JRB APPLICATION WAS SIGNED BY WILLIAM E. BENNS III UNDER DATE OF MAY 25, 1966.

4. UNDER DATE OF AUGUST 16, 1966 KFAB PETITIONED THE FCC TO REJECT THIS APPLICATION BASED ON THE CRITICAL HOURS SKYWAVE INTERFERENCE THAT WOULD BE CAUSED BY THE PROPOSED OPERATION TO KFAB'S 0.1 MV/M GROUNDWAVE CONTOUR IN CONTRAVENTION OF PARAGRAPH 73.187 OF THE FCC'S RULES.

5. UNDER DATE OF AUGUST 19, 1966 JRB FILED AN OPPOSITION TO PETITION TO REJECT APPLICATION AND SIMULTANEOUSLY THEREWITH FILED AN AMENDMENT TO THEIR APPLICATION. SAID AMENDMENT WAS ALSO DATED AUGUST 19, 1966 AS WAS THE ENGINEERING EXHIBIT TO THE AMENDMENT. SAID ENGINEERING EXHIBIT WAS SIGNED BY WILLIAM E. BENNS III.

6. THE STATED PURPOSE OF THE AMENDMENT AND THE ENGINEERING EXHIBIT WAS TO MAKE A "SLIGHT MODIFICATION IN THE DIRECTIONAL ANTENNA ON FILE."

7. THE WRITER HAS STUDIED THIS ENGINEERING EXHIBIT AND IS UNABLE TO FIND THAT IT WILL ADEQUATELY PROTECT KFAB DURING THE CRITICAL HOURS AS IS REQUIRED BY PARAGRAPH 73.187 OF THE FCC'S RULES FOR THE FOLLOWING REASONS:

(A) THE AZIMUTH ARC FROM JRB'S TRANSMITTER SITE TOWARD KFAB'S 0.1 MV/M DAYTIME GROUNDWAVE CONTOUR IS FROM APPROXIMATELY N 277° E TO N 305° E.

(B) JRB'S ENGINEERING EXHIBIT ON FIGURE 2 THEREOF LISTS HORIZONTAL MEOV RADIATIONS FOR THE AZIMUTH ARCS OF N 350° E THROUGH N 0° E TO N 30° E AND FROM N 210° E THROUGH N 280° E.

(C) HENCE THROUGH THE CRITICAL 28° ARC TOWARD KFAB'S 0.1 MV/M CONTOUR MEOV'S ARE ASSIGNED FOR ONLY THE 3° ARC FROM N 277° E THROUGH N 280° E.

(D) CALCULATIONS MADE IN ACCORDANCE WITH PARAGRAPH 73.187 OF THE FCC'S RULES INDICATE THAT THE PROPOSED JRB'S ANTENNA RADIATION WOULD BE WITHIN LESS THAN 9% OF THAT RADIATION WHICH WOULD CAUSE INTERFERENCE TO KFAB'S 0.1 MV/M CONTOUR DURING CRITICAL HOURS THROUGH A PORTION OF THE ARC TOWARD THIS KFAB CONTOUR WHERE NO MEOV VALUES ARE SPECIFIED.

ENGINEERING REPORT

SILLIMAN, MOFFET & KOWALSKI

CONSULTING RADIO ENGINEERS

1405 G STREET, N.W.

WASHINGTON, D. C. 20004

279

KFAB

OMAHA, NEBRASKA

- (E) MEOV VALUES ARE AN ESSENTIAL PART OF A DIRECTIONAL ANTENNA PROPOSAL. THEY REPRESENT THE VALUES THAT WILL NOT BE EXCEEDED IF THE ARRAY IS ADJUSTED SUBSTANTIALLY TO CALCULATED VALUES AND ALLOWED NORMAL AND EXPECTED DAY TO DAY ANTENNA PARAMETER VARIATIONS. FOR INSTANCE COMMON PRACTICE IN MANY ARRAYS IS TO PERMIT INDIVIDUAL TOWER PHASES TO VARY UP TO 3° TO 4° BEFORE READJUSTING SAME.
- (F) JRB'S ENGINEERING EXHIBIT IS ENTIRELY SILENT AS TO THE STEPS THAT WILL BE TAKEN AND THE EQUIPMENT THAT WILL BE EMPLOYED TO HOLD THIS ARRAY STABLE ON A DAY TO DAY BASIS.
- (G) LACKING SUCH A SHOWING RE: STABILITY FACTORS, COUPLED WITH NO SPECIFICATION OF MEOV VALUES TOWARD MUCH OF KFAB'S NORMALLY PROTECTED CONTOUR, IT MUST BE ASSUMED THAT THE PROPOSED ARRAY RADIATIONS WILL VARY BY AS MUCH AS 10% FROM CALCULATED VALUES.
- (H) A 10% INCREASE IN CALCULATED VALUES IS AN OFTEN USED BASIS FOR ASSIGNING MEOV VALUES FOR A REASONABLY COMPLEX FOUR TOWER ARRAY SUCH AS JRB IS PROPOSING. THE WRITER IN HIS MANY YEARS OF EXPERIENCE IN THE DESIGN OF SIMILAR ARRAYS HAS EMPLOYED THIS PROCEDURE MANY TIMES.
- (I) ANOTHER OFTEN USED METHOD OF ESTABLISHING MEOV'S IS TO APPLY A PERCENTAGE OF THE PATTERN RMS (SUCH AS 5% OR 10%) AS AN AMOUNT TO BE ADDED TO THE CALCULATED VALUES TO DETERMINE THE MEOV. THE PROPOSED JRB HORIZONTAL PATTERN RMS IS 1308 MV/M. TEN PERCENT OF THIS WOULD BE 130.8 MV/M AND FIVE PERCENT WOULD BE 65.4 MV/M.
- (J) THE USE OF EITHER 1.1 X CALCULATED VALUES OR ADDITION OF 65.4 MV/M TO THE CALCULATED VALUES WOULD CAUSE THE JRB PROPOSAL TO CAUSE PROHIBITED CRITICAL HOURS RADIATION TOWARD KFAB'S 0.1 MV/M DAYTIME GROUNDWAVE CONTOUR IN CONTRAVENTION OF PARAGRAPH 73.187 OF THE FCC'S RULES.

8. LACKING A SHOWING TO THE CONTRARY, THE WRITER MUST PRESUME A USUAL AND CUSTOMARY MEOV, WHICH REASONABLE ADJUSTMENT AND MAINTENANCE PROCEDURES WOULD DICTATE AS ESSENTIAL, IN THE AREAS WHERE NONE ARE SHOWN TOWARD KFAB. SUCH A PRESUMPTION MUST RESULT IN MEOV'S IN THE CRITICAL ARC TOWARD KFAB OF 1.1 X CALCULATED VALUES. BASED ON THIS PRESUMPTION JRB'S APPLICATION WOULD VIOLATE PARAGRAPH 73.187 OF THE FCC'S RULES AND SAID APPLICATION MUST BE DISMISSED OR ALTERNATIVELY SET FOR HEARING TO ESTABLISH WHAT FIELDS WOULD BE DIRECTED TOWARD KFAB'S 0.1 MV/M DAYTIME NORMALLY PROTECTED CONTOUR DURING CRITICAL HOURS.

9. A FURTHER AMENDMENT BY JRB MAY REMOVE THIS APPARENT CONFLICT BY ASSIGNING MEOV'S IN THE CRITICAL ARC TOWARD KFAB ACCOMPANIED WITH AN ADEQUATE SHOWING AS TO SUCH CRITICAL ITEMS AS PHASE MONITOR TYPE, SAMPLING LOOPS, TEMPERATURE STABLE SAMPLING LINES, BASE CURRENT AMMETER ACCURACY'S, CALCULATED TOWER DRIVING POINT RESISTANCES, NO LOSS RMS VALUE AND RELATED DATA TO PERMIT FULL EVALUATION OF THE ABILITY OF THE PROPOSAL TO ADEQUATELY PROTECT KFAB.

BEST COPY AVAILABLE

from the original bound volume

WASHINGTON, D. C. 20001

JA 20

[283]

November 2, 1966

8720

Lauren A. Colby, Esq.
1334 G Street, N.W.
Washington, D.C. 20005

Dear Sir:

Reference is made to the application submitted on behalf of James River Broadcasting Corporation, tendered May 27, 1966 for a construction permit for a new standard broadcast station on 1110 kilocycles in Norfolk, Virginia; to the "Petition to Reject Application" filed August 16, 1966 by the licensee of Station KFAV, Omaha, Nebraska; to the "Opposition to the Petition To Reject Application," filed August 19, 1966; and to the amendment to the application filed August 19, 1966.

As noted in the "Petition To Reject Application" and in the "Opposition to Petition To Reject Application," the proposed operation did not protect the KFAB 0.1 mv/m contour during critical hours and therefore was not acceptable for filing at the time the application was submitted. Since the application became acceptable only after the amendment was filed (August 19, 1966) the date of the amendment must be considered the date that an acceptable application was on file. Since the application is mutually exclusive with a new proposal for Williamsburg, Virginia (File No. BP-16329) but was not acceptable on May 31, 1966, which was the "cut-off" date assigned to the Williamsburg application, it is not timely filed and must be returned. One copy of the application is being retained by the Commission for future reference.

JA 21

Since a preliminary study of the proposal disclosed the deficiency noted above, no further studies were made to determine if other problems are involved which would preclude acceptance of the application.

Very truly yours,

Ben F. Waple
Secretary

Enclosure:

Application FCC Form 301 (2)

cc: James River Broadcasting Corporation
McKenna and Wilkinson
Radio Station KFAB
Mr. Proctor
Broadcast Facilities
Files

JA 22

[284]

November 2, 1966

8720

KFAB Broadcasting Company
Radio Station KFAB
5010 Underwood Avenue
Omaha, Nebraska 68132

Gentlemen:

Reference is made to your petition to reject the application of James River Broadcasting Corporation for a new standard broadcast station on 1110 kilocycles in Norfolk, Virginia.

As the attached letter indicates, the Commission has returned the aforementioned application as untimely filed because of a failure to meet the assigned "cut-off" date of a mutually exclusive application for Williamsburg, Virginia (File No. BP-16829). For this reason your petition is hereby dismissed as moot.

Very truly yours,

Ben F. Waple
Secretary

Enclosure:

Commission letter to Lauren Colby

cc: McKenna & Wilkinson
Lauren Colby, Esq.
James River Broadcasting Corporation
Mr. Proctor
Broadcast Facilities
Files

285

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

NOV 30 1966

OFFICE OF THE SECRETARY

In re Application of:

JAMES RIVER BROADCASTING CORPORATION)
Norfolk, Virginia)

File No. BP-_____

BROADCAST FACILITIES
DIVISION

For Construction Permit

To: The Commission

DEC 2 1966

PETITION FOR RECONSIDERATION AND REINSTATEMENT OF APPLICATION
NUNC PRO TUNC AS OF MAY 31, AND FOR OTHER RELIEF

Pursuant to Section 405 of the Communications Act of 1934, as amended, James River Broadcasting Corporation (hereinafter referred to as Petitioner) by its attorneys, hereby petitions the Federal Communications Commission (hereinafter referred to as the Commission) to reconsider and set aside its November 2, 1966, return of Petitioner's application; or to waive Sections 1.227 and 1.591(b) of the Commission's Rules to permit comparative consideration of Petitioner's application with the mutually exclusive applications of Virginia Broadcasters (BP-16,829), and Charles E. Springer (BP-17,274); or to accept Petitioner's application nunc pro tunc, as of May 31, 1966; or to accord Petitioner any other relief that the equities of the present circumstances demand. In support thereof, it is alleged:

286

I

PRELIMINARY STATEMENT

Petitioner's application, which was filed on May 27, 1966---four days before the May 31, 1966 cut-off date¹/--- is for a construction permit for a new standard broadcast station to be operated on 1110 kc with a power of 50 kw at Norfolk, Virginia. It proposes the first 50 kw station in Norfolk, (as well as the state of Virginia ^{WRVA is Richmond}), a city with a population of over 322,000 persons and which presently has but four AM stations. Petitioner's application was filed on the "cut-off" of Virginia Broadcasters (BP-16,830), who propose a new 250 w. station at Williamsburg, Virginia, on 1110 kc, and that of Charles E. Springer (BP-17,274), an applicant for a new 250 w AM station at Suffolk, Virginia, on the same frequency.

Petitioner's engineer, however, in the preparation of the Engineering Exhibits for the above application, unintentionally failed to consider the 0.1 mv/m contour of Station KFAB, Omaha, Nebraska---a station located over 1000 miles from Petitioner's proposed station---during two hours of its broadcast day (characterized as critical hours).²/ As a result, Petitioner's proposal did not protect KFAB's 0.1 mv/m contour during critical hours. ,

¹/ Notice of the cut-off date was given by the Commission in a Public Notice released on April 22, 1966.

²/ See Exhibit I, attached.

(On August 19, 1966,) Petitioner, in response to an objection by KFAB Broadcasting, amended its application to cure this minor defect. The error was solely the result of an engineering inadvertency and was eliminated by a minor change in the applicant's pattern before the Commission had taken any action on the application.

The Commission's Staff, however, in a letter dated November 2, 1966, returned Petitioner's application contending that it was not acceptable until the error had been cured, and that since this was after the cut-off date, the application was deemed not timely filed and therefore not entitled to comparative consideration with the previously filed, mutually exclusive applications.

Petitioner submits, and will demonstrate below, that the return of Petitioner's application by the Commission's Staff was erroneous, against the public interest, and contrary to the letter and spirit of Sections 303, 307(b), and 309 of the Communications Act of 1934, as amended, and Section 1.564 of the Commission's Rules; and that therefore the Commission should afford Petitioner the relief requested herein.

II

PETITIONER'S STANDING

Because the return of Petitioner's application has precluded Petitioner from comparative consideration with the aforesaid mutually exclusive applications of Virginia Broadcasters and

Charles E. Springer, Petitioner is a person aggrieved, or whose interests have been adversely affected by the Commission's action, and therefore Petitioner possesses the requisite standing to petition and does hereby petition the Commission to reconsider and set aside its return of Petitioner's application and grant the appropriate relief. Sanders Bros. Radio Station v. Federal Communications Commission, 309 U.S. 470, 9 Pike and Fischer Radio Regulation 2008(1940), Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 12 Pike and Fischer Radio Regulation 2024(1955).

III

PETITIONER'S APPLICATION WAS ERRONEOUSLY RETURNED BY THE COMMISSION'S STAFF

The Commission letter which accompanied the return of Petitioner's application stated that inasmuch as "the proposed operation did not protect the KFAB 0.1 mv/m contour during critical hours...[it was]...therefore...not acceptable for filing at the time the application was submitted". Although no specific section of the Commission's Rules and Regulations is alluded to by the staff in its letter, no doubt it was referring to Section 73.187 of the Rules.^{3/} This section provides that "...no authorization

^{3/} Although Section 73.37(a) of the Rules provides that an application is not acceptable for filing if its proposed operation would involve prohibitive overlap with an existing station, the fact is that Petitioner's application---inasmuch as it involved daytime skywave radiation and not groundwave overlap---did not fall within any of the prohibitions of 73.37(a) of the Rules.

will be granted for Class II facilities if the proposed facilities would radiate, during the two hours after local sunrise and the two hours before local sunset, toward any point on the 0.1 mv/m contour of a co-channel U.S. Class I station..." (emphasis supplied).

Eventhough Petitioner concedes that during critical hours its original proposal did not protect the 0.1 mv/m contour of Station KFAB from daytime skywave radiation and therefore may have been in technical violation of 73.187 of the Rules, there is nothing in the wording of the aforesaid section of the Rules which---by any stretch of the imagination---provides that such a flaw renders the application unacceptable for filing. Therefore, in view of the fact that a violation of 73.187 of the Rules does not make an application unacceptable for filing, and in view of the fact that the application as originally tendered was substantially complete⁴/, the application should not have been returned, but rather, accepted for filing subject to Petitioner's correction of the technical error.

IV

THE EQUITIES INVOLVED REQUIRE ACCEPTANCE OF OF PETITIONER'S APPLICATION FOR FILING

Although Petitioner's originally tendered application involved minor daytime skywave overlap with Station KFAB, Omaha,

⁴/For further arguments in this regard, see VI, below.

Nebraska, and was therefore in alleged technical violation of Section 73.37(a) of the Commission's Rules, which provides that any proposal for a new station will not be accepted for filing if the proposed operation of the new station involves prohibitive overlap with an existing station, and notwithstanding the fact that the alleged overlap was not cured until after the May 31, 1966, cut-off date, sufficient grounds exist for a waiver of the cut-off rules (Sections 1.227 and 1.591(b) of the Rules) in the present circumstances.

Petitioner's application was tendered for filing on May 27, 1966, or four days before Virginia Broadcasters' cut-off date. At the time it was filed, Petitioner had no reason to believe that the application was defective in any respect. The application had been prepared with the assistance of a local communications law firm and the engineering work was performed by an engineer who is qualified to practice before the Commission and who has done so for the past two years. Therefore, Petitioner had done everything humanely possible to insure against any error in presenting its application to the Commission for consideration. However, due to an inadvertent and unintentional error on the part of Petitioner's engineer, the application as originally tendered involved a minor daytime skywave overlap with Station KFAB. The defect was easily curable and was in fact cured by Petitioner on August 19, 1966,

before any action whatsoever was taken on the application by the Commission. The Commission's Staff, however, has deemed the error to be fatal and has returned the application without any consideration of the merits of Petitioner's application.

It is submitted that the "ends of justice"⁵/are not served by such a Draconian application of the Commission's Rules. The President and majority shareholder of Petitioner---being a layman---had not way of knowing of this inadvert nt and curable engineering defect. She depended on the skill and expertise of her engineer, and she should not be so severely penalized for his error, especially in view of the large expenditures of money and effort already spent for the present proposal. The Commission has recognized the inequity of such subrogation in the Application of B.P. Hart⁶/ where it held:

"...We note that the statutory requirement to have have an application signed and sworn to by the applicant is intended to place personal responsibility for the application on the applicant...Only the inadvertance of the Petitioner's attorney precluded compliance with the Commission's filing procedure by the required date. In view of these circumstances, we believe that the equities favor our accepting the petitioner's original application..."

⁵/Section 4(j) of the Communications Act.

⁶/FCC 60-696 , 20 Pike and Fischer Radio Regulation 301,303(1960) .

There is no logical reason why an applicant not held responsible for the "inadvertence" of its attorney should be made to suffer great financial losses for the "inadvertence" of its engineer. The same rule should also be applicable to engineers because the rule is simply a recognition of the fact that engineers as well as attorneys are human beings and therefore capable of occasionally committing errors, and that an applicant who has made a good faith attempt to submit a proposal to the Commission should not be punished for such unforeseeable errors.

V

IT IS AGAINST THE PUBLIC INTEREST NOT TO ACCEPT
PETITIONER'S APPLICATION NUNC PRO TUNC

Notwithstanding the hardship Petitioner has and will suffer if its application is not accepted for filing, the paramount consideration here---the public interest---will not be served by a refusal to accept the above application nunc pro tunc. The Commission has repeatedly stated in the past that the AM band is crowded and is becoming more and more so with each new authorization.⁷ Due to this already congested condition, the possibilities that remain for new stations have decreased sharply in the last 15 years. Therefore, the few possibilities that remain are even

⁷/See Amendment of Part 73 of the Commission's Rules, in Docket No. 15084, 29 FR 9492, 2 Pike and Fischer Radio Regulation 2d 1658(1964).

more precious than they were previously. Furthermore, Congress, recognizing the value and scarcity of the frequencies on the AM band, has given the Commission a mandate to "make such distribution of licenses (and) frequencies...among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service..."^{8/}, and also to "...encourage the larger and more effective use of radio in the public interest"^{9/}. In view of these Congressional mandates, the Commission has the duty to make certain that all AM authorizations are only given to applicants who will provide the most needed service.

Petitioner proposes to provide the city of Norfolk, as well as the State of Virginia, with their first locally oriented 50 kw AM station. Inasmuch as Norfolk has a population of over 322,000 persons and inasmuch as only four AM stations are presently authorized to serve Norfolk---the most powerful station having 5 kw---it is crystal clear that Petitioner proposes to provide the people of Norfolk with a much needed service. Mutually exclusive with Petitioner's application is one by Virginia Broadcasters who propose a 250 w station at Williamsburg---a town of 6,832 persons---and which presently has one AM and two FM stations; and an application

^{8/} Section 307(b) of the Communications Act.

^{9/} Section 303(g) of the Communications Act.

by Charles E. Springer who also proposes a 250 w station at Suffolk---a community of 12,609 persons and which presently has authorized one AM and one FM station. Moreover, with respect to Springer's application, his proposed 5 mv/m contour is placed over Chesapeake, Virginia, a city with a population of 86,000 persons, which is more than twice the population of Suffolk, and it is therefore apparent that his application violates the Commission's new Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities¹⁹ and therefore may never be granted.

If Petitioner's application is not accepted for filing nunc pro tunc and not consolidated with the applications of Virginia Broadcasters and Charles E. Springer, Petitioner will lose the opportunity to be heard on the merits of its application and the Commission will be deprived of the opportunity to select---from all of the proposals ---which is the most needful community. A refusal to waive the cut-off rule or to accept the application nunc pro tunc and consider Petitioner's application amounts to a refusal on the part of the Commission to carry out its statutory obligation---to the detriment of the public interest. It is submitted that the spirit of the Communications Act is violated if a procedural rule is used to effectively deny the public a determination as to the most efficient use of valuable spectrum space.

¹⁹ 30 FR 17177, 6 Pike and Fischer Radio Regulation 2d 1901(1965).

VI

IN ANY EVENT, PETITIONER'S APPLICATION WAS SUBSTANTIALLY COMPLETE
WHEN ORIGINALLY FILED AND SHOULD NOT HAVE BEEN RETURNED

Section 1.564 of the Commission's Rules provides that "substantially complete" applications will be accepted for filing, and if the application is lacking in some minor respect, the applicant will be requested to supply the necessary information.

Although the Commission has never promulgated rules and regulations to guide the staff in deciding whether an application is substantially complete, it has stated that:

"...an application does not have to be letter perfect and contain all information necessary to convince the Commission that a grant would serve the public interest as a condition precedent to acceptance for filing. Rather, our practice has consistently been that if an application is substantially complete, it is accepted for filing and the applicant is afforded the opportunity to supply any other necessary information by amendment."¹¹

Petitioner's application as filed on May 27, 1966, contained all of the information required by the application form. All of the questions were answered; all of the exhibits were included; and none of the five sections of the application form were lacking in any detail whatsoever. In other words, the application was substantially complete and should therefore, pursuant to Section 1.564 of the Rules, have been accepted for filing subject to Petitioner being able to correct the engineering error.

¹¹/ Muskingum Broadcasting Company, FCC 59-1272, 19 Pike and Fischer Radio Regulation 552,555(1959).

The Commission has afforded other applicants similar relief in like circumstances. In this regard, see Elmwood Park Broadcasting Corp.^{12/} where the Commission accepted an application for filing even though Section V-B and V-G pertaining to engineering data had not been originally tendered with the application; also, Teleservice Company^{13/} and Johnson Broadcasting Company^{14/}, both cases in which the Commission accepted applications for filing which were defectively verified. These are just a small sample of a long line of cases in which the Commission has accepted applications where there have been major and even jurisdictional defects.^{15/} Petitioner's application was as substantially complete, if not more so, than the foregoing. In all of the cases, the applicant was given an opportunity to correct its application while its application was being processed. Indeed, Virginia Broadcasters' application---with whom Petitioner is mutually exclusive---did not contain all of the photographs required by the application in Section V-A, (only one photograph was submitted instead of the required eight), and still its application was accepted for filing and the applicant given an

^{12/} See Docket No. 12064, et al.

^{13/} FCC 58-1186, 17 Pike and Fischer Radio Regulation 980(1958).

^{14/} 5 Pike and Fischer Radio Regulation 1326(1950).

^{15/} E.G., Middleboro Broadcasting Co., Inc., 3 Pike and Fischer Radio Regulation 273; Lou Poller, 9 Pike and Fischer Radio Regulation 531(1953); and Lawrence A. Harvey, 9 Pike and Fischer Radio Regulation 636(1953).

opportunity to submit the additional photos¹⁶/ Petitioner sees no reason why it should not be accorded the same opportunity that has been extended to other applicants, especially in view of the fact that such an opportunity was afforded to Virginia Broadcasters.

VII

PETITIONER'S APPLICATION SHOULD NOT HAVE BEEN
RETURNED WITHOUT A HEARING

The return of Petitioner's application by the Commission's staff without designating it for hearing was contrary to the provisions of the Communications Act of 1934. Section 309(e) of the Act provides that if the Commission is unable to determine whether a grant of an application would serve the public interest, convenience, and necessity, it must designate the application for hearing---there is no provision in the Act for a return of an application. In order to be entitled to the procedural rights afforded by 309(e), however, the application must comply with the informational requirements of 308(b) of the Act.

Petitioner's application complied fully with the requirements of Section 308(b) of the Act and therefore should have been---at the very least---designated for hearing. A return of the application because of the initial engineering imperfection has in effect amounted to a denial of Petitioner's application without affording it comparative consideration with the aforesaid

mutually exclusive applications^{17/}. The Supreme Court of the United States has indicated that under 309 of the Act the Commission must grant a hearing before an application is denied.^{18/}

Moreover, the Court of Appeals, in a case involving a 309(b) question, has recently held that:

"...309(b) doesn't apply when the application is lacking in material respects, the application having failed to supply the Commission with information obviously necessary to a consideration of its merit in the public interest. Of course there are borderline cases in which an application approaches essential completeness but is lacking in minor respects. In such a case the Commission should give weight to the interest of the applicant and channel the application through the procedure established with that in view; and we understand that such is the Commission's policy."^{19/}
(Emphasis supplied)

It is significant to note that the established procedure the Court was concerned about no longer exists. In 1960 Section 309 of the Act was amended to eliminate the requirement that the Commission, if unable to determine whether a grant of an application would serve the public interest, notify the applicant of the grounds and reasons for its inability to make such a finding. Inasmuch as the Commission is no longer required to notify applicants of defects

^{17/} Although Section 1.227(b) (4) provides for the dismissal without prejudice of untimely filed mutually exclusive applications, inasmuch as this is only after a final decision is rendered by the Commission with respect to the other applications, the effect is to deny said application without a hearing.

^{18/} Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327, 90 L. Ed. 108 (1945).

^{19/} Ranger et. al. v. Federal Communications Commission, 111 U.S. App. D.C. 44,294 F 2d 240, 21 Pike and Fischer Radio Regulation 2030, 2032 (1961).

in their applications, the Commission no longer---in every instance--- does so. Petitioner, although its application was essentially complete and only lacking in a minor respect, was not only given no notice of the defect but not even given an opportunity to correct the defect before any formal Commission action. Such action in light of the fact that Virginia Broadcasters were given an opportunity to correct its defect is arbitrary as well as discriminatory and constitutes the use of a procedural rule to thwart the specific and direct mandate of Congress and thereby denying rights heretofore protected by the Ashbacker doctrine.

VIII

AS ADMINISTERED IN THIS CASE, SECTION 73.37(a) OF THE COMMISSION'S RULES PLACES AN UNREASONABLE BURDEN ON ALL APPLICANTS AND ITS STRICT APPLICATION CAN OPERATE IN CONTRAVENTION OF THE PUBLIC INTEREST AND SECTION 307(b) OF THE COMMUNICATIONS ACT.

One of the stated purposes for the adoption of Section 73.37(a) of the Commission's Rules (known as the go-no-go rule), was to afford the Commission a "greater degree of flexibility" inasmuch as the old system of giving applicants a chance to correct defects in their applications was consuming too much time.^{20/} The new system--- indeed---gives the Commission's staff a greater degree of flexibility because under the go-no-go system, as administered by the staff in the instant case, if an applicant's engineer makes an error in the

^{20/} Amendment of Part 3 of the Commission's Rules, in Docket No. 15084, FCC 63-468, 24 Pike and Fischer Radio Regulation 1615, 1627-28(1963).

the preparation of the engineering portion of the application---no matter how unintentional and minor---which results in alleged prohibitive overlap with an existing station, the application is deemed unacceptable for filing. If said applicant happens to be filed on some other applicant's cut-off date the application is returned without any further consideration even though the defect is curable. The fact that the rest of the application may be letter perfect; the fact that the applicant had no way of knowing of and therefore preventing the error; and the fact that the proposal may in other respects have much merit are all disregarded.

The application of the go-no-go rule here when coupled with the cut-off provisions of the Commission's Rules places an unreasonable burden on the applicant and its engineer because if the engineer errs---no matter how slightly---the application is not acceptable for filing. In other words, according to the staff interpretation, with respect to 73.37(a) of the Rules, the engineer must be perfect and without fault. The rule, as administered, fails to recognize that engineers can and do make mistakes. The Court of Appeals in Community Broadcasting Co. v. Federal Communications Commission²¹ recognized the fact that the Commission is composed of "mortal men" who are capable of committing unintentional errors.

²¹/ 107 U.S. App. D.C. 95,274 F2d 753(1960).

The Commission's Staff however, by its application of the go-no-go rule here, has refused to recognize human frailty and demands that all engineers be perfect and without error. Such a standard is unreasonable.

Not only is the standard unreasonable but its erroneous application here is contrary to the public interest and the mandate of the Communications Act. Inasmuch as a member of the Commission's engineering staff has determined that the present proposal does not allegedly comply with Section 73.37(a) of the Rules, the application was returned without further consideration. As a result, the Commission has been denied the opportunity--- since there are competing applications---to determine which of the proposals would provide for the most efficient and equitable distribution of radio service among the several states and communities. As the Supreme Court observed in National Broadcasting Co. v. United States^{22/} :

"The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."

^{22/} 319 U.S., 190, 225, 87L.Ed. 1344(1953).

It is submitted that Section 73.37(a) of the Rules should not be used here to prevent the Commission from carrying out the mandate of 307(b) of the Act.

No doubt that the go-no-go rule was intended to give the Commission's Staff a great deal of flexibility in the processing of AM applications; however, Petitioner submits that the Commission could not have intended that it be applied in the manner it was applied in the instant case to permit the outright denial of Petitioner's application without, at least, a hearing, and thereby sacrificing the concepts of justice and fair play for the sake of administrative convenience.^{23/}

IX

CONCLUSION

Petitioner's proposal represents a good faith attempt to provide the people of Norfolk with a much needed service. Due to an inadvertent error on the part of Petitioner's engineer, however, the proposed operation of the station did not protect the 0.1 mv/m contour of Station KFAB from daytime skywave radiation during critical hours, and was therefore in violation of Section 73.187 of the Commission's Rules. The defect was cured before the application was reached by the staff for processing. However,

^{23/} See Office of the United Church of Christ, et. al. v. Federal Communications Commission, 359 F2d 994, 7 Pike and Fischer Radio Regulation 2d 2001 (1966).

the Staff has determined that the error rendered the application unacceptable for filing as originally tendered and returned the application. The contention by the Staff that a 73.187 violation makes an application unacceptable for filing is erroneous and arbitrary and is not supported by the language of the Rule in question. The action also ignores Section 1.564 of the Rules which states that substantially complete applications will be accepted for filing.

Even if the Commission determines, however, that the Staff was not in error, and that Section 73.37(a) of the Rules should apply, Petitioner submits that all of the foregoing clearly demonstrates that "compelling reasons" do exist here for a waiver of Sections 1.227 and 1.591(b) of the Rules,^{24/} or for the acceptance of Petitioner's application nunc pro tunc. At the very minimum, Petitioner should be accorded a hearing to determine the appropriateness of a waiver.^{25/}

^{24/} Fredericksburg Broadcasting Corporation, FCC 60-121, 19 Pike and Fischer Radio Regulation 911(1960).

^{25/} United States v. Storer Broadcasting Co., 351 U.S. 92, 13 Pike and Fischer Radio Regulation 2161(1956).

WHEREFORE, for the reasons stated herein, it is respectfully requested that the Commission grant the relief requested in the first paragraph of the instant pleading.

Respectfully submitted,

JAMES RIVER BROADCASTING CORPORATION

By _____
Lauren A. Colby

1334 G Street, N.W.
Washington, D.C. 20005

By _____
Gennaro D. Caliendo
Its Attorneys

Dated: November 30, 1966

CERTIFICATE OF SERVICE

I, Rochelle Ackerman, hereby certify that on this 30th day of November, 1966, I mailed, postage prepaid, by United States mail, copies of the foregoing "PETITION FOR RECONSIDERATION AND REINSTATEMENT OF APPLICATION NUNC PRO TUNC AS OF MAY 31, AND FOR OTHER RELIEF" to:

Mallyck & Bernton
Colorado Building
Washington, D.C. 20005
Counsel for Charles E. Springer
(BP-17,274)

Prince & Paul
815 15th Street
Washington, D.C. 20005
Counsel for Virginia
Broadcasters, (BP-16,829)

Rochelle Ackerman

EXHIBIT I

CITY OF ROCKVILLE)
) ss:
STATE OF MARYLAND)

AFFIDAVIT

William E. Benns, III, being duly sworn upon oath, deposes and states that he is a graduate engineer; that he has practiced before the Federal Communications Commission for the past two years; that during that time he has prepared the engineering portion of several standard broadcast applications; and that his qualifications are known to the Commission; and that he was retained by the James River Broadcasting Corporation to prepare the Engineering Exhibits for its application for a construction permit for a new standard broadcast station to operate on 1110 kc with a power of 50 kw at Norfolk, Virginia.

He further states that three weeks were spent by him in the preparation of aforesaid exhibits and calculations reported therein; that great care was taken in the preparation of the aforesaid exhibits; that he unintentionally and inadvertantly failed to consider the 0.1mv/m contour of Station KFAB, Omaha, Nebraska, a station located over 1000 miles from the proposed station of James River Broadcasting Corporation; that as a result the proposed

station did not protect the 0.1mv/m contour of Station KFAB during critical hours; and that the Engineering Amendment filed on August 19, 1966, which was also prepared by him, corrects the aforesaid problem.

WILLIAM E. BENNS, III
William E. Bennis, III

Subscribed and sworn to
before me this 29th day of
November, 1966.

Notary Public

• My Commission Expires July 1, 1967

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of:

JAMES RIVER BROADCASTING CORPORATION
Norfolk, Virginia

For Construction Permit

To: The Commission

File No. BP-_____

ERRATUM

James River Broadcasting Corporation, by its attorneys, hereby corrects the "Petition for Reconsideration and Reinstatement of Application Nunc Pro Tunc as of May 31, 1966, and for Other Relief" filed on November 30, 1966, by the addition to page 13 of footnote 16, which, because of a mechanical failure of the reproduction machine, did not appear thereon. The omitted footnote is the following:

^{16/} See letter to Virginia Broadcasters dated April 18, 1966 (#8720), from the Commission's License Division.

WHEREFORE, it is respectfully requested that footnote 16 be associated with the aforesaid Petition.

Respectfully submitted,

JAMES RIVER BROADCASTING CORPORATION

Lauren A. Colby

1334 G Street, N.W.
Washington, D.C. 20005

By

Gennaro D. Caliendo
Gennaro D. Caliendo

Dated: December 1, 1966.

Its Attorneys

* * *

307

*Posted
12/1/66*

REC'D
DEC 2 1966
BROADCASTING DIVISION

RECEIVED
DEC 1 1966

LAUREN A. COLBY
 ATTORNEY AT LAW
 1100 15th St. N.W.
 Washington, D.C. 20005
 Tel. 703-130

GEMARCO D. CALIENDO

December 1, 1966

Mr. Ben F. Waple
 Secretary
 Federal Communications Commission
 Washington, D.C. 20554

DEC 1 1966
 F. C. C.
 OFFICE OF THE SECRETARY

Dear Mr. Waple:

On behalf of our client, James River Broadcasting Corporation, I hand you herewith, for re-filing, in duplicate, an application for a construction permit for a new standard broadcast station, to be operated on 1110 kc, with a power of 50 kw, at Norfolk, Virginia. As the Commission is aware, the application was originally filed on May 27, 1966. However, the application was returned to the applicant on November 2, 1966, for alleged failure to comply with the Rules.

On November 30, 1966, the applicant filed a "Petition for Reconsideration and Reinstatement of Application Nunc Pro Tunc as of May 31, 1966, and for Other Relief". Pending the disposition of the aforesaid Petition, the application is being re-tendered for filing.

No filing fee is accompanying the retender of this application because it was paid when the application was originally submitted for filing. Also, inasmuch as the Commission retained one copy of said application when it determined that there was an alleged violation of the Rules, only duplicate copies are now being submitted.

Therefore, no change is proposed from that originally proposed

Very truly yours,

Lauren A. Colby

By *[Signature]*
 Gemmarco D. Caliendo

GDC/ra
 Enclosure

311

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

RECEIVED

DEC 12 1966

REC'D
DEC 14 1966

OFFICE SECRETARY

In re Application of

JAMES RIVER BROADCASTING CORPORATION
Norfolk, Virginia

File No. BP-_____

For Construction Permit

To: The Commission

STATEMENT BY KFAB BROADCASTING COMPANY

In a pleading filed August 16, 1966, KFAB Broadcasting Company asked that the above-captioned application be rejected (under Rule 73.187) since it failed to protect KFAB's ground wave 0.1 mv/m normally protected contours during critical hours. In an opposition thereto filed August 19, 1966, the applicant asserted that the deficiencies noted in KFAB's pleading had been cured by a concurrently filed amendment. In a reply to that opposition filed August 30, 1966, KFAB denied that the amendment removed the interference problems of which KFAB had complained in its original pleading, and renewed its request that the above-captioned application be rejected.

Without passing on whether the August 19 amendment did in fact eliminate interference to KFAB the Commission by letter dated November 2, 1966 stated that the James River application as originally tendered would have caused interference to KFAB, and hence was unacceptable on the May 31, 1966 cut-off date.

For reasons set forth in the engineering study attached to its August 30, 1966 reply, KFAB reasserts that the August 19 amendment did not cure the interference problems which KFAB raised in its initial pleading of August 16. Said fact furnishes a second ground for rejecting the James River application and refusing to accord it a comparative hearing with conflicting proposals submitted prior to the May 31, 1966 "cut-off" date.

KFAB BROADCASTING COMPANY

By /s/ Vernon L. Wilkinson
Vernon L. Wilkinson

McKenna & Wilkinson
1705 DeSales Street, N. W.
Washington, D. C. 20036

Its Attorney

December 12, 1966

CERTIFICATE OF SERVICE

I, Joan E. Ball, hereby certify that I have this 12th day of December 1966, sent copies of the foregoing "Statement by KFAB Broadcasting Company" by first-class United States mail, postage prepaid, to the following:

Gennaro D. Caliendo, Esq.
1334 G Street, N. W.
Washington, D. C. 20005
Counsel for James River Broadcasting Company

Mallyck & Bernton
Colorado Building
Washington, D. C. 20005
Counsel for Charles E. Springer (BP-17,274)

Prince & Paul
815 15th Street, N. W.
Washington, D. C. 20005
Counsel for Virginia Broadcasters (BP-16,929)

/s/ Joan E. Ball

Joan E. Ball

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of:

JAMES RIVER BROADCASTING CORPORATION
Norfolk, Virginia

For Construction Permit

To: The Commission

SECRETARY

File No. BP-_____

*Unassigned
Postel
rk*

RESPONSE TO "STATEMENT BY KFAB BROADCASTING COMPANY"

James River Broadcasting Corporation, by its attorneys, hereby responds to the "Statement" filed on December 12, 1966, by KFAB Broadcasting Company, with respect to the above application.

In response thereto, it is alleged:

1. In a "Statement" filed on December 12, 1966, KFAB Broadcasting Company once again^{1/} has alleged that the operation of James River's proposed station, as amended, at Norfolk, Virginia, fails to protect the 0.1 mv/m contour of Station KFAB, Omaha, Nebraska, during critical hours; is in violation of Section 73.187 of the Commission's Rules; and that, therefore, the application of James River should be rejected and not accepted for filing.

2. Contrary to KFAB's contention that the engineering amendment filed by James River on August 19, 1966, still fails

^{1/} See "Petition to Reject Application" and "Reply to Opposition" filed by KFAB on August 16, 1966, and August 30, 1966, respectively.

to protect the 0.1 mv/m contour of Station KFAB, Omaha, Nebraska, from daytime skywave radiation, and that the Commission, in its letter of November 2, 1966, which returned James River's application, failed to pass on whether the amendment eliminated the interference, the fact is that the amendment did, in fact, eliminate the interference and the Commission's letter so held. ✓

3. As has been explained in James River's amendment to its application filed on August 19, 1966, which is incorporated by reference herein, the original defect was the result of an engineering inadvertancy and was eliminated by a change in the applicant's pattern. Said change was made and incorporated in the aforesaid amendment. The Commission did---indeed---pass ✓
on the amendment and found that it did cure the original defect.
In this regard, see the Commission's letter of November 2, 1966, which stated that James River's application "...became acceptable for filing only after the amendment was filed (August 19, 1966)..."
Therefore, it is crystal clear that the aforesaid amendment has cured the original defect; that the Commission has so found; and that therefore the matter is moot.

4. Moreover, even though the original engineering proposal did fail to protect the 0.1 mv/m contour of Station KFAB from daytime skywave radiation, and therefore violated Section 73.187

of the Commission's Rules, there is nothing in the language of Section 73.187 of the Rules which would make an application which is in violation of this Rule unacceptable for filing.^{2/} ✓ (?)

WHEREFORE, it is respectfully requested that the "Statement of KFAB Broadcasting Company", BE DISMISSED AS MOOT.

Respectfully submitted,

JAMES RIVER BROADCASTING CORPORATION

LAUREN A. COLBY

BY Lauren A. Colby
Lauren A. Colby
and

1334 G Street, N.W.
Washington, D.C. 20005

BY Gennaro D. Caliando
Gennaro D. Caliando

DATED: December 19, 1966.

Its Attorneys

^{2/} See James River's Petition for Reconsideration and Reinstatement of Application Nunc Pro Tunc as of May 31, and for Other Relief, filed on November 30, 1966, and incorporated by reference herewith.

318

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

DEC 21 1966

In re Application of)

JAMES RIVER BROADCASTING CORPORATION)
Norfolk, Virginia)

File No. BP-_____

For Construction Permit)

BROADCAST FACILITIES
DIVISION

To: The Commission)

DEC 23 1966

OPPOSITION TOPETITION FOR RECONSIDERATION AND FOR OTHER RELIEF

Comes now Charles E. Springer and, by his attorneys, opposes the above-captioned Petition of James River Broadcasters which seeks to have the James River application considered competitively with the applications of Virginia Broadcasters (BP-16,829) and Charles E. Springer (BP-17,274) which were "cut-off" on May 31, 1966.

As set out in the instant petition, the James River application was filed four days before the "cut-off date" but, because of an omission in the engineering data, was returned by the Commission.^{1/} An amended application, purporting to cure the omission, was tendered August 19, 1966, almost three months after the "cut-off" date. By the instant petition, James River seeks to have its amended application considered competitively with the other two applications referred to above.

^{1/} The omission was the failure to protect the 0.1 mv/m ground-wave contour of co-channel, Class I-B Station KFAB, Omaha, Nebraska, from sky-wave interference during critical hours. See Sec. 73.187.

In seeking to persuade the Commission to grant its amended application competitive standing nunc pro tunc, as of the "cut-off date," the James River petition runs a gamut of arguments from A to Izzard to Sanders Bros., but few of these arguments need detain us long. Moreover, there is a threshold question that the Commission will have to dispose of before it ever reaches the instant petition for, in a pleading filed August 30, 1966, and entitled "Reply to Opposition," KFAB Broadcasting Company, licensee of KFAB, submitted an Engineering Statement showing that the James River proposal, even as amended, could not be expected to protect the 0.1 mv/m contour of that station from sky-wave interference during critical hours. Springer here adopts and endorses that showing as being an additional reason why the James River application may not be accepted for filing. And, of course, if the Commission rules in favor of KFAB on this question, the instant petition will then be dismissed moot.

Turning now to the petition itself, we can dismiss as wholly without merit the contention that the failure to protect KFAB from sky-wave interference during critical hours was not a sufficient reason for returning the application. Although sky-wave interference is not mentioned in Sec. 73.37, it is equally prohibited by Sec. 73.187. And even if we assume that the only overlap cognizable under Sec. 73.37 is overlap of ground wave signals, it is perfectly apparent that an application that ignores and fails to protect against sky-wave

interference to a Class I station is hardly "substantially complete" for the purposes of Secs. 1.227 and 1.591(b) of the Rules. Accordingly, the James River application, as initially tendered, was clearly not entitled to consolidation with any applications that were "cut-off" before that omission was rectified. Moreover, as is seen from the attached Engineering Statement, the deviation from the protection requirement to KFAB was a substantial one, so no claim of de minimis will lie in this situation.^{2/}

Petitioner's various pleas for clemency are similarly ill-founded. The argument that the Commission's procedural rules should not be enforced so as to preclude consideration of an "otherwise meritorious" application is an invitation to chaos for every application is potentially meritorious^{3/} but, unless the Commission's procedural rules are enforced as to all, there will be an administrative confusion from which none can be granted. The due enforcement of these rules raise

^{2/} Compare the matter of the "additional photos" which the staff requested from Virginia Broadcasters (referred to at fn. 16 of the instant petition) which is clearly de minimis.

^{3/} Actually, the petitioner's application is less meritorious than most for, although only four AM stations are assigned to Norfolk, itself, Standard Rate and Data Service credits the Norfolk area (Norfolk-Portsmouth-Hampton-Newport News and Virginia Beach) with 10 AM and 7 FM stations; and there is an application pending for an 11th AM station to be assigned to Newport News.

no question under Sanders Bros. or of constitutional due process, Kessler v. F.C.C., 1 KR 2d 2061 (U.S. C.A.D.C. 1963) nor is petitioner entitled to a hearing if its application does not comply with rules adopted by the Commission and "necessary for the orderly conduct of its business." U.S. v. Storer Broadcasting Company, 381 U.S. 42, 13 RR 2161, 2168 (U.S. S.Ct. 1956).

The argument that James River should not be penalized for the error of its consulting engineer comes close to sham, since petitioner's President (although a woman) is no stranger to the broadcasting business^{4/} and the consulting engineer on whom the petitioner relied is not only her son but is, himself, a 5 per cent principal and Secretary-Treasurer and Director of petitioner.

Finally, it should be noted that, completely apart from what else can be said against petitioner's position, its difficulties are of its own making. The Virginia Broadcaster's application, which was the one "cut-off" on May 31, was filed in July 1965, and was pending 10 months before the "cut-off date." Petitioner, through its consultant-engineer principal, had knowledge of the pendency of this application and could have filed at any time thereafter. If it had filed at any time during 1965, the staff would probably have discovered the omission and returned the application in ample time for

^{4/} According to the James River application, Mrs. Benns was, for 16 years, a principal assistant to her former husband in his consulting radio engineering business.

petitioner to correct and refile it prior to the May 31 "cut-off date." However, petitioner - for its own purposes^{5/} - withheld filing its own application until 4 days before the "cut-off date." Although there was nothing culpable in its action, petitioner cannot be heard to complain if this is one of the consequences of the course of action it elected to follow.

As a matter of law, as a matter of equity and as a matter of the proper application of the Commission's Rules, the Commission acted correctly in returning petitioner's application; and its instant petition, seeking reversal of that action, or avoidance of the result thereof, should be denied. See Natick Broadcast Associates, Inc., 8 RR 2d 824.

Respectfully submitted,

CHARLES E. SPRINGER

By

Mallyck & Bernton,
621 Colorado Building
Washington, D. C.
Its Attorneys

November 21, 1966

^{5/} Presumably to conceal as long as possible from other potential applicants that the frequency could be used for 50 KW in the Norfolk area.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of December 1966, sent copies of the foregoing "Opposition" by United States mail, postage prepaid, to the following:

Gennaro D. Caliendo, Esq.
1334 "G" Street, N. W.
Washington, D. C. 20005
Counsel for James River Broadcasting Company

Prince & Paul
815 - 15th Street, N. W.
Washington, D. C. 20005
Counsel for Virginia Broadcasters (BP-16,829)

Vernon Wilkinson, Esq.
1705 DeSales Street, N. W.
Washington, D. C. 20036
Counsel for KFAB Broadcasting Company

E. Theodore Mallyck

ENGINEERING REPORT

324

SILLIMAN, MOFFET & KOWALSKI

1408 G STREET, N.W.

CONSULTING RADIO ENGINEERS

WASHINGTON, D. C. 20005

SUFFOLK, VIRGINIA

ENGINEERING STATEMENT

1. THE WRITER IS CONSULTING ENGINEER TO CHARLES E. SPRINGER APPLICANT FOR A NEW STANDARD BROADCAST STATION AT SUFFOLK, VIRGINIA TO OPERATE ON 1110 Kc/s WITH 250 WATTS DAYS EMPLOYING A NONDIRECTIONAL ANTENNA. (BP-17,274)

2. THE SUFFOLK PROPOSAL ADEQUATELY PROTECTS THE CLASS 1-B STATION KFAB, OMAHA, NEBRASKA ON 1110 Kc/s BOTH GROUNDWAVE WISE AND DURING CRITICAL HOURS IN ACCORDANCE WITH FCC RULES PARAGRAPH 73.187.

3. THE WRITER HAS STUDIED THE ORIGINAL APPLICATION ENGINEERING SUBMITTED BY JAMES RIVER BROADCASTING CORPORATION (JRB) PROPOSING TO UTILIZE 1110 Kc/s WITH 50 KW-DA DAYS AT NORFOLK, VIRGINIA. SAID ENGINEERING WAS SIGNED BY WILLIAM E. BENNS UNDER DATE OF MAY 25, 1966.

4. THE WRITER HAS STUDIED THE FOLLOWING PETITION SUBMITTED BY JAMES RIVER WITH PARTICULAR REFERENCE TO THE ALLUSIONS THEREIN TO THE INTERFERENCE THAT WOULD BE CAUSED TO KFAB DURING CRITICAL HOURS BY THE JRB PROPOSAL.

A. PETITION FOR RECONSIDERATION AND REINSTATEMENT OF APPLICATION NUNC PRO TUNC AS OF MAY 31, AND FOR OTHER RELIEF DATED NOVEMBER 30, 1966

ON PAGES 3, 5, 6 AND 15 OF THIS PETITION REFERENCE IS MADE TO A MINOR DEFECT IN THE JRB MAY 25, 1966 ENGINEERING WHICH WOULD RESULT IN A MINOR DAYTIME SKY WAVE OVERLAP WITH STATION KFAB.

5. THE WRITER'S STUDIES INDICATE AS FOLLOWS:

- (A) AT AN AZIMUTH OF N 291.5° E KFAB'S 0.1 MV/M LIES AT A DISTANCE OF APPROXIMATELY 832 MILES FROM THE PROPOSED JRB TRANSMITTER SITE
- (B) THE MAXIMUM PERMISSIBLE RADIATION JRB CAN DIRECT TOWARD A CLASS 1-B GROUNDWAVE 0.1 MV/M AT N 291.5° E AND 832 MILE SEPARATION IN ACCORDANCE WITH PARAGRAPH 73.187 OF THE FCC RULES IS 548.6 MV/M THROUGH A VERTICAL ARC FROM THE HORIZONTAL TO 7° ABOVE THE HORIZONTAL.
- (C) JRB'S HORIZONTAL RADIATION AS READ FROM ITS PROPOSED PATTERN IN ITS MAY 25, 1966 ENGINEERING EXHIBIT IS 615 MV/M AT N 291.5° E
- (D) JRB'S PATTERN SHOWS NO MEOV AT THIS AZIMUTH. SHOULD AN ARBITRARY 10% INCREASE IN THE CALCULATED VALUE BE ASSUMED (AS IS NOT UNUSUAL) TO PROVIDE FOR MEOV, THE RADIATION FOR USE IN THIS COMPUTATION WILL INCREASE TO 676.5 MV/M.
- (E) THE JRB CALCULATED RADIATION WITH NO MEOV ALLOWANCE FOR DAY TO DAY VARIATION AND/OR ADJUSTMENT-TOLERANCE EXCEEDS THE MAXIMUM PERMISSIBLE VALUE BY:

$$\left[(615/548.6) \times 100 \right] - 100 = 12.1\%$$

ENGINEERING REPORT

SILLIMAN, MOFFET & KOWALSKI
CONSULTING RADIO ENGINEERS

1406 G STREET, N.W.

WASHINGTON, D. C. 20005

SUFFOLK, VIRGINIA

ENGINEERING STATEMENT (CONTD.)

PARAGRAPH 5 CONTINUED

- (F) ALLOWING 10% OF CALCULATED VALUES FOR MEOV WOULD INCREASE THIS VIOLATION OF 73.187 BY:

$$[(676.5/548.6) \times 100] - 100 = 23.3\%$$

6. A 12.1% VIOLATION OF PARAGRAPH 73.187 IS NOT, IN THE WRITER'S OPINION, MINOR BUT IS SIGNIFICANT. A 23.3% VIOLATION OF PARAGRAPH 73.187 IS, IN THE WRITER'S OPINION, VERY SUBSTANTIAL.

7. ALL CALCULATIONS AND DATA CONTAINED HEREIN OR ON WHICH THIS STATEMENT IS BASED WERE MADE IN ACCORDANCE WITH THE PERTINENT REQUIREMENTS OF THE FCC RULES UNLESS OTHERWISE SPECIFICALLY SO STATED.

inlet about amended pet.?

* * *

327

CATV.
OFFICE
DEC 28 1966

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

RECEIVED
DEC 22 1966

OFFICE OF THE SECRETARY

JAN 11 1967

In re Application of)

JAMES RIVER BROADCASTING CORPORATION)
Norfolk, Virginia.)

File No. BP-_____

For Construction Permit)

To: The Commission)

Unassigned
Posted
ok

VIRGINIA BROADCASTERS OPPOSITION

Comes now Virginia Broadcasters, a partnership, and, by its attorneys, opposes James River Broadcasting Corporation's (James River) request for reinstatement^{1/} of its application for a construction permit for a new standard broadcast station at Norfolk, Virginia on 1110 kc, 50 kw. Virginia Broadcasters is an applicant for a construction permit for a new standard broadcast station at Williamsburg, Virginia (File No. BP-16,830). James River attempted unsuccessfully to file an acceptable application in conflict with Virginia's Broadcasters' application on the latter's cutoff date of May 31, 1966.

^{1/} The pleading filed November 30, 1966, is entitled, "Petition For Reconsideration and Reinstatement of Application Nunc Pro Tunc as of May 31, and For Other Relief."

A. Basis of Opposition

1. James River's unusual request should be denied. Neither the law nor the equities support or justify reinstatement of the application, nunc pro tunc. James River fails to grasp the legal issue in question, and it distorts undisputed facts in order to attempt to plead "inequitable" treatment.

B. Applicable Law

2. The return or acceptance of a defective application is a matter within the discretion of the Commission depending on the completeness or lack thereof submitted with the application, WSTV, Inc., 9 RR 624 (1953), Lawrence Harvey, 9 RR 636 (1953). James River acknowledges that its application as originally filed was defective and incomplete in that protection to a dominant 1-B station, KFAB, Omaha, Nebraska was ignored entirely. Consequently, James River must concede that this one omission was sufficient to make the application incomplete and defective. It is the nature of the omission which governs, not the number of omissions.

3. James River argues that it remedied the fatal defect prior to action or examination by the

Commission and that this fact is controlling.^{1/} However, James River was on notice that its application would be governed by the May 31, 1966, cutoff date of Virginia Broadcasters. Thus, whether James River tendered an amendment to the application after the cutoff date, but before the Commission was able to review its application which rectified the fatal omission, is irrelevant.

4. The argument that the Commission's Rules impose an impossible standard of "no error" on applicants and their engineers is without merit. The Commission's Rules did not prohibit James River from filing its application long in advance of the May 31, 1966, cutoff date in order for it to have had an opportunity to have remedied the fatal omission in time by May 31, 1966. Virginia Broadcasters' application was tendered for filing approximately eleven months before the May 31, 1966 cutoff date. James River sought the advantage of Virginia Broadcasters' cutoff date; namely, a savings in processing time and the umbrella protection. In addition, it sought the advantage of surprise by filing at the eleventh hour. The

^{1/} This contention is disputed by KFAB Broadcasting Company (see Statement, filed December 12, 1966).

Commission's Rules do not present an impossible standard as attested to by the fact that Charles W. Springer, the other applicant filing on Virginia Broadcasters' cutoff date, encountered no difficulty in filing a complete and acceptable application. Hundreds of acceptable applications have been filed ever since the Commission changed its Rules to place a greater premium on accuracy and completeness. The Commission's Rules leave no room for error only in cases where the applicant delays filing until the eleventh hour. The choice is one for the applicant to make, and the decision is made with the awareness of the consequences.

C. Lack of Equities

5. James River, after its half truths are exposed, can offer no justifiable basis for the contention that the failure to reinstate its application would be inequitable. James River attempts to play on the Commission's sympathies by implying that an innocent woman is the victim of circumstance, inasmuch as she relied upon the expertise of her engineer. Virginia Broadcasters' notes for the Commission's attention that the engineer in question has had a mere two years' experience in the preparation of broadcast applications,

is the woman's son, and an officer, director, and stockholder of James River. Consequently, the complicated engineering proposal was designed and prepared by the applicant not by an independent contractor. The Commission in its "Instructions" to FCC Form 301, Page 1, advises the applicant to familiarize itself with, among other things, Parts 1, 2, 3, and 17 of the Commission's Rules and Regulations and Standards of Good Engineering Practice and warns applicants in bold type that "Defective or Incomplete Applications May be Returned Without Consideration." An applicant cannot place the consequences of having submitted a poorly prepared application on the Commission, Radio Cabrillo, 19 RR 1189, 1194 (1960). The Commission, in adopting the cutoff procedure, announced that potential applicants would be well advised to make certain that their applications are in good order before filing, 19 RR at 1194. An applicant that, by no fault of anyone but its own, files a defective application must suffer the consequences and stand aside while other timely filed and properly prepared applications have the opportunity to be heard, Cf. Community Broadcasting Company, 19 RR 911 (1960). The fatal defect in the James River application was exposed

at the very threshold of its prosecution of the application. Consequently, James River has not acquired equities of having prosecuted an application and obtained a construction permit before the fatal defect was discovered (Community Broadcasting Company, 19 RR 911 (1960)).

For the above stated reasons, Virginia Broadcasters opposes James River Broadcasting Corporation's request for reinstatement of its application, nunc pro tunc, as of May 31, 1966.

Respectfully submitted,

VIRGINIA BROADCASTERS

By Ray R. Paul
Ray R. Paul *WRH*

By Dean George Hill
Dean George Hill

Prince & Paul
Its Attorneys

815 Bowen Building
Washington, D. C. 20005

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 5 1967

In re Application of)

JAMES RIVER BROADCASTING CORPORATION)
Norfolk, Virginia)

For Construction Permit)

To: The Commission)

File No. BP-_____

BROADCAST FACILITIES
JAN 11 1967Unassigned
Postcard
rkREPLY TO OPPOSITION OF CHARLES E. SPRINGER

James River Broadcasting Corporation, by its attorney, hereby respectfully replies to the Opposition filed in this proceeding on November 21, 1966 by Charles E. Springer. In reply thereto, it is alleged:

1. In his Opposition, Charles E. Springer contends that James River deliberately withheld the filing of its application until the last possible moment and thereby deprived itself of an opportunity to correct the error which its consulting engineer had made. The simple answer to this contention is that it is untrue. Attached hereto is an affidavit of James River's consultant, fully explaining the circumstances surrounding the filing of the application---circumstances which did not reasonably permit the filing of the application any sooner than May 25, 1966.

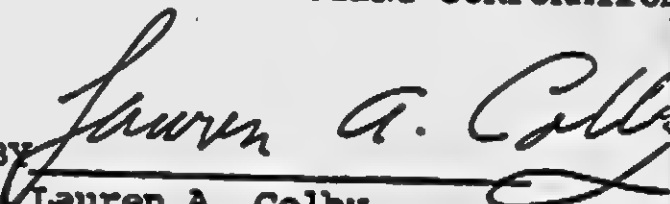
2. Springer further contends that James River is not entitled to relief because its consulting engineer is also a principal of the applicant. But Springer fails to explain why this should be so. Human error is human error, whether committed by a principal of an applicant or not. "To err is human; to forgive, Divine". The engineer for Charles E. Springer has himself erred on occasion in exactly the same manner as the engineer for James River---that is, by overlooking certain protection problems, (see the pending application of Molly Pitcher Broadcasting Company for a construction permit for a new standard broadcast station at Freehold, New Jersey).

3. Finally, Springer's engineer---who, whether or not by coincidence, is also the engineer for Station KFAB, Omaha, Nebraska---contends that the amendment to the James River application still fails to protect Station KFAB. The Commission has already found otherwise. Nevertheless, there is attached hereto an engineering statement of William E. Benns, III, fully responding to the arguments of the KFAB-Springer engineer.

WHEREFORE, it is respectfully requested that the Petition for Reconsideration and Other Relief, filed in this proceeding by James River Broadcasting Corporation, BE GRANTED.

Respectfully submitted,
JAMES RIVER BROADCASTING CORPORATION

1334 G Street, N.W.
Washington, D.C. 20005

BY 
Lauren A. Colby
Its Attorney

CERTIFICATE OF SERVICE

I, Rochelle Ackerman, hereby certify that on this 9th day of January, 1967, I mailed postage prepaid, by United States mail, copies of the foregoing "Reply to Opposition of Charles E. Springer". to:

Mallyck & Bernton
621 Colorado Building
Washington, D.C.

Prince & Paul
815-15th Street, N.W.
Washington, D.C. 20005

Vernon Wilkinson, Esq.
1705 DeSales Street, N.W.
Washington, D.C. 20036


Rochelle Ackerman

STATE OF MARYLAND)
)
CITY OF ROCKVILLE) SS:

AFFIDAVIT

William E. Bennis, III, being first duly sworn, deposes and states as follows:

I am the William E. Bennis who is Secretary-Treasurer and a 5% stock subscriber of James River Broadcasting Corporation, and who prepared the engineering portion of James River's application for a construction permit for a new standard broadcast station at Norfolk, Virginia. I have been asked to state my recollection of the circumstances surrounding the preparation and filing of the application.

To my recollection, the application had its genesis in a discussion between my mother, Barbara Bennis and myself, which took place in February, 1966. It was her suggestion that we form a corporation to apply for a radio station in Norfolk, and she requested me to perform a frequency search for that purpose.

This, I did, and it was only through the frequency search that the availability of the 1110 kc frequency was established and the existence of the competing Williamsburg application was discovered.

Following the discovery of the availability of the 1110 kc frequency, a transmitter site had to be located, and this was accomplished in the first week of March, 1966. It was only then that the preparation of the engineering could be commenced.

The engineering proposal of James River Broadcasting Corporation is a complicated one, involving four towers. I am employed fulltime as a consulting engineer for Multronics, Inc., in Rockville, Maryland, and had to do the work in my spare time. Accordingly, though I commenced work on the project immediately after the site was located, and devoted virtually all of my spare time to it, the project was not completed until May 25, 1966, and could not have been completed any sooner without interfering unreasonably with my other work duties.

William E. Bennis III
William E. Bennis, III

Subscribed and sworn to
before me this 6th day of
January, 1967

Frederic J. Smith
Notary Public

My Commission Expires July 1, 1967.

JAMES RIVER BROADCASTING COMPANY
NORFOLK, VIRGINIA

311

ENGINEERING STATEMENT

This Engineering Statement has been prepared on behalf of James Rivers Broadcasting company (JRB) applicant for a new standard broadcast station to operate on 1110 KHz in Norfolk, Virginia with a power of 50 KW DA-D. The purpose of this exhibit is to illustrate that the amended application of JRB completely protects KFAB Omaha, Nebraska during critical hours to the full extent required by the FCC Rules.

The "Opposition to Petition For Reconsideration and for other Relief" filed by Charles E. Springer, applicant for 1110 KHz, 250 watts nondirectional in Suffolk, Virginia, contains an Engineering Statement signed by John A. Moffet who also is the engineer for KFAB Omaha. This engineering statement deals with the allowable radiation during critical hours on a bearing of 291.5° from JRB toward KFAB, on this bearing the allowable radiation to the KFAB 0.1 mv/m contour is approximately 548 mv/m from the horizontal to 7° elevation as computed in accordance with Section 73.187 of the Rules. The pattern contained in the JRB amendment dated August 19, 1966 shows a maximum radiation of 477.9 mv/m on this bearing, which is well below the allowed 548 mv/m. There is no MEOV on the pattern toward KFAB, and there is no requirement in the Rules for having MEC. There is no precedent for arbitrarily assuming an MEOV where none has been shown in the application. In this case it is the judgment of this engineer that the proposed pattern of James River Broadcasting Company can be adjusted to the values shown in the August 19, 1966 amendment. It should also be pointed out that the proposed pattern does not have as much radiation toward KFAB as would be allowed under the Rules.

The amended pattern of JRB completely protects KFAB under Section 73.187 of the Rules.

William E. Benns III
WILLIAM E. BENNS, III

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of:

JAMES RIVER BROADCASTING CORPORATION
Norfolk, Virginia

For Construction Permit

To: The Commission

File No. BP-_____

BROADCAST EXHIBITS
JAN 17 1967

REPLY TO VIRGINIA BROADCASTERS OPPOSITION

James River Broadcasting Corporation (hereinafter referred to as Petitioner), by its attorneys, hereby replies to the "Opposition" filed in this proceeding on December 23, 1966, by Virginia Broadcasters, a partnership. In reply thereto it is alleged:

1. In its "Opposition", Virginia Broadcasters contends that Petitioner intentionally withheld the filing of its application until the "eleventh hour"---in an alleged attempt to take advantage of Virginia Broadcasters' cut-off date--- and therefore Petitioner should not be heard to complain of the Commission's action in refusing to permit it to correct an inadvertent and unintentional error of its engineer. Contrary to Virginia Broadcasters' unfounded allegation, the fact is that the filing of Petitioner's application on May 27, 1966---four days before the May 31, 1966 cut-off---was the result of circumstances which did not reasonably permit the filing of the application any sooner. There is attached in Exhibit I

an affidavit of Petitioner's engineer fully describing the events surrounding the preparation of the engineering portion of Petitioner's application which clearly indicates that the application was not intentionally filed at the last possible moment just to take advantage of Virginia Broadcasters' cut-off.

2. Virginia Broadcasters further contends that Petitioner's application, as tendered for filing, was "poorly prepared" and that Petitioner should be made to suffer the consequences of its own actions. Such contention is unfounded in fact and inconsistent with any proper interpretation of the Commission's Rules. Section 1.564 of the Rules specifically provides that "substantially complete" applications will be accepted for filing, and if the application is lacking in some minor respect, the applicant will be requested to supply the necessary information.

3. Petitioner's application as filed on May 27, 1966, contained all of the information required by the application form. All of the questions were answered; all of the exhibits were included; and none of the five sections of the application form was lacking in any detail whatsoever. In other words, the application was substantially complete and should therefore, pursuant to Section 1.564 of the Rules, have been accepted for filing subject to Petitioner being able to correct the engineering error.^{1/}

^{1/}The original engineering defect was cured by Petitioner in an amendment filed on August 19, 1966, and the Commission so held in its letter to Petitioner dated November 2, 1966, which returned its application.

CERTIFICATE OF SERVICE

I, Rochelle Ackerman, hereby certify that on this 13th day of January, 1967, I mailed, postage prepaid by United States mail, copies of the foregoing "Reply to Virginia Broadcasters Opposition" to the following:

Mallyck & Bernton
621 Colorado Building
Washington, D.C.

Prince & Paul
815-15th Street
Washington, D.C. 20005

Vernon Wilkinson, Esquire
1705 DeSales Street, N.W.
Washington, D.C. 20036


Rochelle Ackerman

Exhibit 1

STATE OF MARYLAND)
CITY OF ROCKVILLE) SS:

AFFIDAVIT

William E. Benns, III, being first duly sworn, deposes and states as follows:

I am the William E. Benns who is Secretary-Treasurer and a 5% stock subscriber of James River Broadcasting Corporation, and who prepared the engineering portion of James River's application for a construction permit for a new standard broadcast station at Norfolk, Virginia. I have been asked to state my recollection of the circumstances surrounding the preparation and filing of the application.

To my recollection, the application had its genesis in a discussion between my mother, Barbara Benns and myself, which took place in February, 1966. It was her suggestion that we form a corporation to apply for a radio station in Norfolk, and she requested me to perform a frequency search for that purpose.

This, I did, and it was only through the frequency search that the availability of the 1110 kc frequency was established and the existence of the competing Williamsburg application was discovered.

Following the discovery of the availability of the 1110 kc frequency, a transmitter site had to be located, and this was accomplished in the first week of March, 1966. It was only then that the preparation of the engineering could be commenced.

The engineering proposal of James River Broadcasting Corporation is a complicated one, involving four towers. I am employed fulltime as a consulting engineer for Multronics, Inc., in Rockville, Maryland, and had to do the work in my spare time. Accordingly, though I commenced work on the project immediately after the site was located, and devoted virtually all of my spare time to it, the project was not completed until May 25, 1966, and could not have been completed any sooner without interfering unreasonably with my other work duties.

William E. Benns, III
William E. Benns, III

Subscribed and sworn to
before me this 6th day of
January, 1967

William J. Aubrey
Notary Public

My Commission Expires July 1, 1967

[350]

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1967

Released: July 31, 1967

By the Commission: Commissioners Bartley and Loevinger absent.

1. The Commission has before it for consideration (a) the above applications of Virginia Broadcasters and Charles E. Springer and Rose Mae Springer, his wife, d/b as Suffolk Broadcasters, both of which have been accepted for filing; (b) the James River proposal, which has not been accepted for filing; (c) a "Petition for Reconsideration and Reinstatement of Application Nunc Pro Tunc as of May 31, 1966, and For Other Relief", filed November 30, 1966, by James River; (d) a "Petition To Reject [the James River] application", as supplemented, filed August 16, 1966, by KFAB Broadcasting Company, licensee of Station KFAB, Omaha, Nebraska; and (e) pleadings in opposition and reply to the aforementioned petitions. If accepted for filing, the James River proposal would be mutually exclusive with the other two applications and entitled to consolidation with them.

2. The James River application was tendered for filing on May 27, 1966 — four days prior to the published cut-off date (May 31, 1966) of the lead application, Virginia Broadcasters. However, the application was returned as unacceptable for filing because of excessive daytime skywave radiation (Section 73.187 of the Rules). In its petition, James River asks that the Commission (i) set aside its action (by letter of November 2, 1966) returning the application; or (ii) waive the provisions of Section

[351]

1.227 to permit comparative consideration with the Springer and Broadcasters proposals; or (iii) accept the application *nunc pro tunc* May 31, 1966.

BEST COPY AVAILABLE

from the original bound volume

3. On August 19, 1966, James River tendered an amendment purporting to correct the original defect by reducing radiation to protect the 0.1 mv/m groundwave contour of Station KFAB (1110kc, 50 kw, DA-N, U) during critical hours in accordance with the provisions of Section 73.187. James River's position is that its application should have been accepted as timely filed on the grounds that (i) since it was substantially complete, it was erroneously returned; (ii) return of the application without hearing abrogated its *Ashbacker* rights¹; (iii) it should not be held responsible for an error by its consulting engineer; and (iv) return of the proposal would deprive the Commission of a choice between Norfolk and the other two cities under Section 307(b) of the Communications Act of 1934, as amended.

4. James River's argument that its application was substantially complete and lacking only in some minor respects is not well founded and cases cited in support of this contention² are not pertinent. They involved defects such as failure to submit copies of corporate by-laws and articles of incorporation; failure to submit adequate balance sheets; failure to comply with state security laws; failure to give exact street address of studio; and minor variations in transmitter site coordinates. The Commission has always permitted applicants to correct these types of deficiencies after acceptance and even by amendment after designation for hearing. In none of the cases cited was a question of protection of an existing station involved. On the other hand, James River violated an important technical standard which specifically bars all proposals that do not provide adequate daytime skywave protection for Class I stations.

5. James River's contention that it was not afforded its *Ashbacker* rights is likewise ill-founded. In that case the court stated that "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the op-

portunity which Congress chose to give him". [Emphasis added]. Clearly, defective or untimely applications are not entitled to consolidation under *Ashbacker; Ranger et al. (Radio Cabrillo) v. FCC.*, 21 RR 2030 (1961); *Kittyhawk Broadcasting Corp.*, 7 FCC2d 153, 9 RR 2d 709 (1967).

6. With respect to James River's argument that return of its proposal would deprive the Commission of the opportunity of making a 307(b) choice between Norfolk and the other two cities, we find that whatever merit this argument has would also attach to countless potential applications for other communities. This, of course, would leave the Commission's cut-off and consolidation procedures a shambles. Even if the operation of 307(b) were our sole consideration, we note that Norfolk itself has four standard broadcast stations and the Norfolk-Portsmouth S.M.S.A. has seven.

¹ *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945).

² E.g., *Lou Poller*, 9 RR 531; *Middleboro Broadcasting*, 3 RR 273; *Lawrence A. Harvey*, 9 RR 636.

[352]

7. The question of whether an applicant should be penalized because of an error of its consulting engineer was also raised in *Natick Broadcast Associates, Inc.*, 6 FCC 2d 607, 9 RR 2d 360 (1967). There, under strikingly similar circumstances, we stated:

"If applicants were to be saved from the consequences of defects in their applications, merely because the defective portions of their applications were prepared by engineering consultants rather than themselves, it is reasonable to assume that — as in Gresham's law — engineering work of poorer quality would tend to drive out costlier but more carefully prepared engineering submissions."

The rationale in *Natick* is perhaps even more appropriate in the present case, because the engineer involved is an officer, director and five percent stockholder of James River as well as the son of its president and majority stockholder.

8. In summary, we find that, since the proposal as originally tendered violated Section 73.187, it was "patently not in accordance with the Commission's Rules" within the meaning of Section 1.566 and was properly returned as unacceptable. Although the amendment tendered August 19, 1966, corrected the engineering defect, it did not do so until after the lead application's cut-off date. As a result, the application was not timely filed under Section 1.571(c) and was not entitled to consolidation under Section 1.227(b) of the Rules. If James River had not decided to delay its filing until shortly before Virginia Broadcasters' cut-off date, perhaps the defect could have been remedied in time. But, the plight of which it complains is of its own making; and public interest considerations can hardly be said to weigh in favor of the procedural disarray that would result from its acceptance. *Natick Broadcast Associates, Inc.*, *supra*. Thus, the James River petition will be denied and its application returned. In light of this ruling, it will not be necessary to discuss specifically the petition to reject by Station KFAB and their pleadings will be dismissed as moot.

9. We turn now to the two remaining mutually exclusive applications. An examination of the Virginia Broadcasters application indicates that a total of \$60,580 is needed to construct and operate the proposed station for a period of one year without revenues.³ Virginia shows \$1,000 in available assets of the partnership, and proposes to obtain the remainder of the

³Virginia Broadcasters shows cash requirements for construction and operation of the proposed station for one year without revenues in the total amount of \$49,400. However, the applicant has included only \$3,000 of the

\$10,000 cost of land on the basis, according to Virginia, that "it appears that (it) can obtain financing for 70% of the total price of the land." Inasmuch as this loan is not substantiated (applicant states that it will not arrange the final financing for the purchase until such time as it receives its construction permit), \$7,000 must be added for this item; also the sum of \$4,180 must be added for first-year payments of principal and interest on its proposed equipment loan (advanced credit) which Virginia failed to include in its cost of equipment.

[353]

necessary funds through various assets of one of the partners, Gilbert L. Granger, who states in a letter dated July 8, 1965, that such funds will come from liquidation of marketable common stocks, personal earnings, and a loan on his Richmond Road property. Although the application includes a written loan offer to Mr. and Mrs. Granger from the Williamsburg Savings and Loan in the amount of \$18,800 on the Richmond Road property, it is dated May 4, 1965, states that it is valid for 10 days only, and therefore cannot be considered valid at this time. Furthermore, the Grangers' balance sheet is no longer current. Therefore, the Commission cannot determine the amount of liquid assets which would be available to finance construction and operation of the proposed station.

10. Examination of the Springer application indicates that the proposed 5 mv/m contour of this proposal penetrates the geographic boundary of the city of Chesapeake, Virginia. The population (1960 census) of Chesapeake (73,647) is over 50,000, and is more than twice that of Suffolk (12,609). Accordingly, a presumption of intent to serve the larger community arises under the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901. On February 14, 1967, the applicant submitted data for the purpose of rebutting the presumption.

11. After examination of the material submitted, the Commission finds that Springer has demonstrated its intention to serve its

specified station location rather than Chesapeake. The proposed 5 mv/m contour covers only 11 square miles (having a population of 28) of the city of Chesapeake. The area penetrated is part of the great Dismal Swamp which occupies the westerly third of Chesapeake and the easterly third of Nansemond County, of which Suffolk is the approximate geographical center. Chesapeake, which came into being as a city on January 1, 1963, through a merger of Norfolk County and the city of South Norfolk, although rather large in area (344 square miles) is not a metropolitan community in the usual or conventional sense. The city of Chesapeake is roughly rectangular, extending from 16 to 19 miles in a north-south direction and from 13 to 31 miles in an east-west direction. Most of the area is sparsely populated farmland or swamp with a density of approximately 22 persons per square mile. All the business and industrial areas of the city lie within the boundaries of the former city of South Norfolk, which has a density of 3,150 persons per square mile.⁴ South Norfolk is about 20 miles from Suffolk and is not even penetrated by the applicant's 2 mv/m contour. Thus, because of the unusual nature and demographic makeup of Chesapeake we believe that a 307(b) suburban communities issue is not called for in this instance.

12. The Commission finds that, except as indicated by the issues specified below, Virginia Broadcasters and Charles E. Springer and Rose Mae Springer, his wife, d/b as Suffolk Broadcasters, are qualified to construct and operate as proposed. However, since their proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding upon the issues set forth below.

⁴For a detailed description of Chesapeake see the hearing examiner's findings in *South Norfolk Broadcast Co.*, 1 FCC 2d 621.

[354]

Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent order, upon the following issues:

1. To determine the areas and populations which would receive primary service from each of the applications and the availability of other primary service to such areas and populations.
2. To determine with respect to the application of Virginia Broadcasters, Inc.:
 - a) Whether the \$18,800 loan commitment to the Grangers is still available.
 - b) Whether assuming the funds noted in (a) above, are available, the applicant has sufficient additional funds available to construct and operate its proposed station for one year.
 - c) Whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.
3. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.
4. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

IT IS FURTHER ORDERED, That the petition for reconsideration by James River Broadcasting Corporation IS DENIED and its application, as amended, IS RETURNED as unacceptable for filing.

IT IS FURTHER ORDERED, That the petition to reject, as supplemented, filed by KFAB Broadcasting Company, IS DISMISSED as moot.

IT IS FURTHER ORDERED, That in the event of a grant of either of the applications, the construction permit shall contain the following condition:

Pending a final decision in Docket No. 14419 with respect to pre-sunrise operation with daytime facilities, the present provisions of Section 73.87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

[355]

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, give notice of the hearing, either individually or, if feasible and consistent with the Rules, jointly, within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

BRIEF FOR APPELLANT

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,180

JAMES RIVER BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

SUFFOLK BROADCASTORS,

Intervenor.

**APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 12 1967

LAUREN A. COLBY ✓
1334 G Street, N.W.
Washington, D.C. 20004

Nathan J. Paulson Attorney for Appellant
CLERK

(i)

QUESTIONS PRESENTED

1. Where Appellant's application for a new radio station in Norfolk, Virginia, was timely filed prior to a "cut off date" published by the Federal Communications Commission, but through error failed to provide adequate protection from electrical interference to a radio station in Omaha, Nebraska, and where said error was cured by an amendment filed after the cut off date, whether the Federal Communications Commission acted arbitrarily and capriciously in dismissing said application.*

2. Where Appellant's above-described application was mutually exclusive with two other competing applications for radio stations in Williamsburg, Virginia, and Suffolk, Virginia, whether the Commission erred in dismissing Appellant's application and refusing to make Appellant a party to the hearing proceedings involving the Williamsburg and Suffolk applications.

*Intervenor reserves the right to argue that the amendment did not cure the error.

INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES AND REGULATIONS INVOLVED	4
STATEMENT OF POINTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. The Return of Appellant's Application Was Arbitrary and Capricious	7
II. The Commission's Actions in This Case Denied Appel- lant's Application Without a Hearing, in Violation of Section 309 of the Communications Act	10
III. The Commission's Actions in This Case Violated Its Own Rules	11
IV. The Commission's Actions in This Case Were Discrim- inatory and Inconsistent with Its More Favorable Treat- ment of Other Applicants	13
V. The Commission's Actions in This Case Violated the Requirements of Section 307(b) of the Communica- tions Act	14
VI. The Entire System of Returning Applications for Real or Alleged Engineering Defects Is Not Only Arbitrary and Capricious, But Is Completely Unnecessary to the Proper Conduct of the Commission's Business	15
CONCLUSION	17
APPENDIX A—Statutes Involved	App. 1
APPENDIX B—Engineering Plates	App. 19

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
*Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945)	6, 10, 11, 15
*Valley Broadcasting Co., Inc. v. FCC, 99 U.S. App. D.C. 156, 237 F.2d 784 (1956)	8
Community Broadcasting Co. v. FCC, 107 U.S. App. D.C. 95, 274 F.2d 753 (1960)	8
United States v. Storer Broadcasting Co., 351 U.S. 92 (1956)	14
 <u>DECISIONS OF THE COMMISSION:</u>	
Elmwood Park Broadcasting Corp., FCC Docket No. 12064	13
Fine Music, Inc., 9 Pike and Fischer Radio Regulation 2nd 219 (1966)	14
Johnson Broadcasting Company, 5 Pike and Fischer Radio Regulation 1326 (1950)	13
Lawrence A. Harvey, 9 Pike and Fischer Radio Regulation 636 (1953)	13
Lou Poller, 9 Pike and Fischer Radio Regulation 531 (1953)	13
Middleboro Broadcasting Co., Inc., 3 Pike and Fischer Radio Regulation 273 (1946)	13
Muskingum Broadcasting Company, 19 Pike and Fischer Radio Regulation 552 (1959)	13
Teleservice Company, 17 Pike and Fischer Radio Regulation 980 (1958)	13
 <u>STATUTES:</u>	
Administrative Procedure Act of 1946, 5 U.S.C. 1001, et seq., Section 10	1

(v)

Communications Act of 1934, as amended, 47 U.S.C. 151,
et seq.:

Section 307(b)	14, 15
Section 309	6, 10, 14
Section 402(b)	1

RULES OF THE COMMISSION:

Section 1.522 (47 C.F.R.)	3, 11
Section 1.227 (47 C.F.R.)	11
Section 1.571 (47 C.F.R.)	2, 11
Section 73.37 (47 C.F.R.)	12
Section 73.187 (47 C.F.R.)	12



In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,180

JAMES RIVER BROADCASTING CORPORATION,

Appellant.

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

SUFFOLK BROADCASTORS,

Intervenor.

***APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION***

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is taken by James River Broadcasting Corporation (hereinafter referred to as "Appellant"), pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended (47 U.S.C. § 402(b)(6)), Section 10 of the Administrative Procedure Act (5 U.S.C. § 1009), and Rule 37 of this Court, from a Memorandum Opinion and Order of the

Federal Communications Commission (hereinafter referred to as "Commission"), released July 31, 1967 (FCC 67-850, R. 350-355), dismissing without a hearing Appellant's application for a construction permit for a new standard broadcast station at Norfolk, Virginia.

STATEMENT OF THE CASE

Section 1.571 of the Rules and Regulations of the Federal Communications Commission (47 C.F.R. 1.571) sets up a regularized procedure for the processing of applications for construction permits for new standard broadcast stations. Under the procedure established therein, lists of applications on file with the Commission are published from time to time and the public is given notice that anyone wishing to file an application which will be in conflict with the applications on the list must file such competing application no later than a specified date (known as the "cut-off date").

On April 22, 1966, the Commission released a public notice, advising that the application of Virginia Broadcasters for a construction permit for a new 250 watt standard broadcast station on the frequency 1110 kilocycles at Williamsburg, Virginia, would be "cut-off" on May 31, 1966. Following the release of the Commission's public notice, James River Broadcasting Corporation commenced the preparation of a competing application to utilize the same frequency at Norfolk, Virginia, with a power of 50,000 watts. On May 27, 1966, the application of James River Broadcasting Corporation was filed. Additionally, a third application for the frequency 1110 kilocycles was filed by Charles E. Springer, who proposes to construct a new 250 watt standard broadcast station at Suffolk, Virginia.¹ The three applications of

¹ In the intervening months Charles E. Springer—who traded as "Suffolk Broadcasters"—has died, and his application has been amended to specify a completely different party as the applicant. Thus, the Commission has allowed the filing of what amounts to a com-

Virginia Broadcasters, Charles E. Springer and James River Broadcasting Corporation are mutually exclusive with each other. That is, the operation of more than one of the proposals at the same time would involve intolerable electrical interference. Consequently, no more than one proposal may be granted.

On August 16, 1966, approximately six weeks after the filing of the James River application, a petition to reject that application was filed by the licensee of Standard Broadcast Station KFAB, Omaha, Nebraska. KFAB pointed out, correctly, that due to an error in one of the engineering exhibits accompanying the application, the application failed to provide adequate protection from electrical "daytime skywave" interference to Station KFAB during the hours of the day when such interference can occur. Following the receipt of the KFAB petition, the engineer for James River Broadcasting Corporation checked his engineering calculations and found that there was, indeed, a readily curable error in the engineering portion of the application. He at once prepared a corrective amendment, clearing up the interference. This amendment was submitted to the Commission on August 19, 1966, pursuant to Section 1.522 of the Commission's Rules and Regulations, which specifically allows the amendment of an application as a matter of right at any time prior to the date when the application is designated for hearing.

On November 2, 1966, the Commission returned the application of James River Broadcasting Corporation to the applicant, contending that the application was not acceptable for filing because of the daytime skywave interference to Station KFAB and contending further that the correction of the mistake which caused the interference could not be accepted because the mistake was not discovered and corrected until after the "cut-off" date. On November 30,

pletely new application after the "cut off date." This treatment of the Springer application contrasts markedly with the treatment afforded Petitioner.

1966, James River filed a Petition for Reconsideration of the Commission action. Said petition was denied by the Commission July 19, 1967. On the same date, the Commission designated the applications for Williamsburg, Virginia, and Suffolk, Virginia, for a consolidated hearing to determine which of said applications should be granted. The Commission refused to consolidate the James River application in the hearing and instead has physically returned the James River application to the applicant. James River filed an appeal from the Commission's action, in this Court. Additionally, on August 21, 1967, Petitioner filed a motion in this Court, requesting that the Commission's action be stayed, and that the Commission be directed not to take any action or hold any hearings on the Williamsburg or Suffolk applications until this Court has heard the merits of this appeal. On September 26, 1967, after a hearing before Judges Fahy, Burger and McGowan, this Court granted Appellant's Motion for Stay.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Communications Act of 1934, as amended, and the Commission's Rules and Regulations are set forth in Appendix A, *infra*.

STATEMENT OF POINTS

1. Where Appellant's application for a new radio station in Norfolk, Virginia, was timely filed prior to a cut-off date published by the Federal Communications Commission, but through error failed to provide adequate protection from electrical interference to a radio station in Omaha, Nebraska, and where said error was cured by a subsequent amendment properly filed in accordance with the Commission's Rules, the action of the Federal Communications Commission in dismissing the application and physically returning it to Appellant was arbitrary and capricious and deprived Appellant of due process of law.

2. Where Appellant's above-described application was mutually exclusive with two other competing applications for radio stations in Williamsburg, Virginia, and Suffolk, Virginia, the Commission's action, dismissing and physically returning Appellant's application and refusing to make Appellant a party to the hearing proceedings on the Williamsburg and Suffolk applications, wrongfully deprived Appellant of its rights to a consolidated hearing under the provisions of the Communications Act and effectively denied Appellant's application without a hearing, in violation of said Act.

3. In returning Appellant's application without a hearing, the Commission arbitrarily determined that the public should be deprived of the benefits of Appellant's 50,000 watt proposal, in violation of the Commission's statutory mandate to allocate radio frequencies in such a manner as to bring about a fair, efficient and equitable distribution of such frequencies.

4. Even assuming, solely *arguendo*, that the Commission's Rules allowed it to return Appellant's application, the Commission erred in refusing to waive its Rules, as requested by Appellant, so as to allow Appellant's application to be considered comparatively with competing applications for Williamsburg and Suffolk, Virginia.

SUMMARY OF ARGUMENT

Appellant, James River Broadcasting Corporation, prepared and filed with the Federal Communications Commission an application for a construction permit for a new standard broadcast station to operate on the frequency 1110 kc at Norfolk, Virginia. In accordance with the Rules and requirements of the Commission, Appellant filed its application prior to the "cut-off date" or "deadline" published by the Commission. The application was in all respects substantially complete and proper on its face, but unbeknownst to Appellant, its consulting engineer had made a minor mis-

take in engineering calculations so that the application if granted as originally filed, would have created a small amount of "daytime skywave" interference to a radio station located more than 1,000 miles away in Omaha, Nebraska. Subsequent to the filing of the application, and after the cut-off date, the owners of the Nebraska station filed a document with the Commission, calling Appellant's attention to the mistake.

As it had every right to do under the Commission's Rules, Appellant immediately (within three days) filed an amendment correcting the error. However, the Commission nevertheless dismissed Appellant's application and physically returned it to Appellant, contending that because the application was not perfect when filed, it could not be considered.

The Commission's actions were highhanded, arbitrary and capricious and were not sanctioned by any of the Commission's own Rules. Additionally, said actions violated the requirement of Section 309 of the Communications Act that no substantially complete application be denied without a hearing, and the requirements laid down by the Supreme Court in the *Ashbacker* case that mutually exclusive applications may not be denied without a *consolidated* hearing.

Furthermore, the Commission's action in refusing to consider Appellant's 50,000 watt proposal, unfairly deprived the public of an opportunity to receive a powerful new wide-area radio service, and thereby violated the Commission's congressional mandate to allocate radio frequencies in such a way as to bring about a "fair, efficient and equitable distribution of radio service".

Finally, even assuming, solely *arguendo*, that the Commission had the right pursuant to its own Rules to return Appellant's application, it was arbitrary and capricious for the Commission to refuse to grant Appellant a waiver of those Rules under the circumstances here presented.

ARGUMENT

I

**The Return of Appellant's Application
Was Arbitrary and Capricious**

This case involves an appeal from an action of the Federal Communications Commission, physically returning and refusing to consider an application solely because the application contained an error in engineering calculations—an error which was readily curable and which was, in fact, completely corrected by a simple amendment filed long before the Commission finally decided to return the application.

The Commission's argument that Appellant's application, as originally tendered, would have violated an "important" engineering requirement is specious and misleading. The engineering portion of the application contained more than 50 pages of charts, tables, graphs and figures (R. 148-241). It showed that Appellant's engineer had considered and eliminated interference to literally dozens of stations on the same and adjacent channels. Through oversight, one station—KFAB, Omaha, Nebraska—had not been considered. That oversight was hardly an inexplicable and inexcusable crime, as the Commission seems to contend. Station KFAB is located more than a thousand miles from Norfolk, and could conceivably receive interference from the Norfolk proposal only during a few limited hours of the day, just after sunrise and prior to sunset, when the so-called "daytime sky-wave" phenomenon occurs. So slight was the problem of interference to KFAB that Appellant's engineer was able to prepare a corrective amendment and file it within three days after discovery of his error. Plates 1 and 2, Appendix B, *infra*, show the Appellant's proposed radiation pattern before and after the amendment to eliminate the interference. So slight was the change in the pattern that it cannot even be detected except by the closest inspection.

To simply throw out Appellant's application because of such a minor and readily curable defect was to act in a

manner which can only be characterized as highhanded. Yet, this is not the first time that the Commission has been guilty of such arbitrary and capricious action. Only a few years ago, it chose to dismiss a properly filed protest pursuant to Section 309 of the Communications Act, solely because the protestant was a few minutes late in assembling his papers. *Valley Broadcasting Co., Inc. v. FCC*, 99 U.S. App. D.C. 156, 237 F.2d 784 (1956). Fortunately for the hapless protestant, this Court struck down the Commission's actions. It should do the same in this instance.

This Court has recognized the fact that the Federal Communications Commission is composed of "mortal men," who are capable of committing unintentional errors. *Community Broadcasting Co. v. FCC*, 107 U.S. App. D.C. 95 (1960). The Commission is not so charitable. The standard which it seeks to impose in this case places an intolerable burden on the consulting engineer for a standard broadcast applicant. If there be one single mistake in the engineering portion of a standard broadcast application, the Commission takes the position that it has the right—if it chooses—to physically return the application to the hapless applicant. Indeed, approximately 40% of all applications submitted to the Commission are similarly returned in this fashion, without any hearing and without even an opportunity to test the validity of the Commission's determination that there has been a mistake in engineering or other defect.

Because of the danger of malpractice suits and of exposure to public embarrassment, consulting engineers have been loath to take appeal to this Court from such determinations by the Commission. Here, the Commission's Memorandum Opinion and Order makes much of the fact that James River's engineer is an officer, director, and 5% stockholder of Appellant, as well as the son of its President and majority stockholder. It is only because of these relationships, however, that it has been possible for James River to take this appeal without subjecting its consulting engineer to the dangers previously described. Moreover, James River's engineer is no amateur. He is a full time employee of one

of the top consulting engineering firms in the City of Washington and is regularly engaged in the preparation of many proposals for new standard broadcast stations. And prior to his present employment, he assisted his father—a consulting engineer of more than 25 years experience—in the same type of work.

There is no evidence whatever to sustain the Commission's position that harsh punishment for erring engineers is necessary in order to raise the quality of engineering submissions. Every engineer is well aware of the draconian system which has been devised by the Commission and fully realizes that any mistakes will be punished ruthlessly. Yet, there is not an active consulting engineer who has not had one or more applications returned by the Commission since the current system was adopted in 1964. The reason, of course, is simple: engineers being mortal, they are bound to make an occasional error, no matter what dire sanctions the Commission may devise with which to chastise them.

The Commission states that James River's plight is of its own making because it "decided to delay its filing until shortly before Virginia Broadcasters' "cut-off" date. Not so! James River demonstrated by an affidavit submitted to the Commission that it never made any deliberate decision to delay the filing of its application. The cut-off list, giving notice of the deadline for filing applications, was published on April 22, 1966 and provided only 38 days notice. Thus Appellant had only 38 days in which to prepare an engineering proposal consisting of some 51 pages of charts, tables, graphs, maps, equations, and figures. Under the circumstances, it was quite impossible for James River to file any sooner. But even if it had filed sooner, it is not likely that the error would have been caught in time to satisfy the Commission. For it was approximately six weeks after filing that the error was discovered, so that even if the application had been filed the day after the release of the public notice (which gave five weeks notice of the deadline), a corrective amendment could not have been filed until after the "cut-off" date.

II

The Commission's Actions in this Case Denied Appellant's Application Without a Hearing, in Violation of Section 309 of the Communications Act.

No hearing was ever afforded to Appellant prior to the return of Appellant's application. In effect, the Commission denied Appellant's application without a hearing—despite the clear requirement of Section 309 of the Communications Act that no broadcast application ever be denied without a proper evidentiary hearing.

In past years, the Commission has previously attempted to circumvent the clear requirement of the statute that a hearing be held before a broadcast application may be denied. In the famous case of *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), two applications had been filed for a particular facility, and the Commission had granted one, while, at the same time, affording the second applicant a hearing on the question of whether the grant to the first applicant should be allowed to stand or should be set aside. The Supreme Court, construing Section 309 of the Communications Act, held that such a procedure was contrary to the intent of Congress. The Court said:

Congress has granted applicants a right to a hearing on their applications for station licenses.⁹ Whether that is a wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him. (326 U.S. at 333)

At footnote 9 of its opinion in *Ashbacker*, the Supreme Court observed that, "Apparently no regulation exists which, for orderly administration, requires an application for a frequency previously applied for, to be filed within a certain date. . .". After the *Ashbacker* decision, however, the Com-

mission did enact certain "cut-off Rules", which are incorporated in Section 1.571 of its Rules and Regulations and in Section 1.227 of its Rules and Regulations (47 C.F.R. 1.227). The Commission's cut-off Rules provide, in substance, that applicants desiring to be considered with competing applications must file substantially complete applications prior to the published cut-off dates of such competing applications. Here, Appellant filed its application prior to the cut-off date of the competing Williamsburg application. Appellant's application was substantially complete and the Commission has never challenged the substantial completeness of the application. The Commission, however, has denied Appellant the consolidated hearing required by the doctrine of the *Ashbacker* case, solely because Appellant's application contained a readily curable mistake in engineering calculations—a mistake which the Appellant cured by a simple amendment which it filed as a matter of right pursuant to specific Commission Rules permitting such amendments.²

III

The Commission's Actions in this Case Violated Its Own Rules

Appellant respectfully submits that the Commission's action, returning its application, was harsh, unreasonable and completely unwarranted by any valid provision of the Commission's Rules and Regulations.

In 1962, the Commission imposed a lengthy freeze on the acceptance and processing of all standard broadcast applications. Following the lifting of the freeze in 1964, the Commission adopted a so-called "go-no-go" system for the processing of AM applications. New Rules were adopted—Rules which have never been tested in this Court—which purport

²Section 1.522 of the Commission's Rules permits amendment of applications as a matter of right, at any time until they are designated for hearing.

to allow the Commission to return applications without hearing, if the Commission, in its sole judgment, decides that the applications would result in the creation of certain types of electrical interference.³

The Commission, however, did not return Appellant's application because of any alleged violation of any so-called "go-no-go" Rules. Rather, the Commission returned the application because the application as originally submitted would have resulted in a type of electrical interference called "daytime skywave interference", occurring only during certain limited hours of the day. The Commission has no Rule requiring or providing for the return of an application because of "daytime skywave interference". The Commission does have a Rule (Section 73.187 of the Rules) which states that applications involving excessive daytime skywave radiation will not be granted. But, unlike the "go-no-go" Rules, which are applicable to other types of electrical interference, Section 73.187 of the Commission's Rules does not state that applications involving daytime skywave interference will not be accepted. Thus, in refusing to accept Appellant's application, the Commission acted contrary to the provisions of its own Rules, so that even if the Rules purporting to allow the Commission to return applications without a hearing are valid—and Appellant submits that they are not valid—the Commission's action in the instant case clearly exceeded its authority, and was contrary to the most elementary concepts of due process.

³See, e.g., 47 C.F.R. 73.37.

IV

The Commission's Actions in This Case Were Discriminatory and Inconsistent with Its More Favorable Treatment of Other Applicants

In addition, Appellant submits that the Commission's action against James River Broadcasting Corporation was discriminatory and stands in marked contrast to much more lenient treatment afforded to other applicants in similar circumstances. The Commission has stated that:

... an application does not have to be letter perfect and contain all information necessary to convince the Commission that a grant would serve the public interest as a condition precedent to acceptance for filing. Rather, our practice has consistently been that if an application is substantially complete, it is accepted for filing and the applicant is afforded the opportunity to supply any other necessary information by amendment.⁴

In *Elmwood Park Broadcasting Corp.*, FCC Docket No. 12,064, the Commission accepted an application for filing even though Sections V-B and V-G, containing absolutely essential engineering data, had not originally been tendered with the application. In *Teleservice Company*, 17 Pike and Fischer RR 980 (1958) and *Johnson Broadcasting Company*, 5 Pike and Fischer RR 1326 (1950), the Commission accepted applications for filing which were defectively verified. These are just a small sample of a long line of cases in which the Commission has accepted applications where there have been major and even jurisdictional defects.⁵ Indeed, the Commission accepted the application of Virginia

⁴ *Muskingum Broadcasting Company*, 19 Pike and Fischer Radio Regulation 552, 555 (1959).

⁵ E.G., *Middleboro Broadcasting Co., Inc.*, 3 Pike and Fischer Radio Regulation 273; *Lou Poller*, 9 Pike and Fischer Radio Regulation 531 (1953); and *Lawrence A. Harvey*, 9 Pike and Fischer Radio Regulation 636 (1953).

Broadcasters—which is mutually exclusive with Appellant's application—even though the application omitted seven out of a total of eight transmitter site photographs required to be submitted. In the case of *Fine Music, Inc.*, 9 Pike and Fischer R.R.2d 219 (1966), the Commission, in order to avoid a forfeiture of hearing rights, on its own motion, waived the "cut-off" Rule and, on the basis of new engineering data, accepted an application previously rejected on overlap grounds. Yet here, even though Appellant specifically requested a waiver of the cut-off Rules if the Commission considered such a waiver necessary to the submission of the curative engineering amendment, the Commission rejected the request for waiver without even affording Appellant a hearing. The rejection of the request for waiver constitutes a separate and independent reason why the Commission's actions must be reversed. *United States v. Storer Broadcasting Co.*, 351 U.S. 92 (1956).

V

The Commission's Actions in This Case Violated the Requirements of Section 307(b) of the Communications Act

The Commission's rejection of Appellant's application without a hearing not only violates Section 309 of the Communications Act, but also Section 307(b) of the Communications Act. The mandate of Section 307(b) requires the Commission to so allocate standard broadcast stations as to bring about a fair, efficient and equitable distribution of radio service. Here, solely because of the fortuitous circumstance of a minor error in Appellant's application, the Commission has decided that the public should be deprived of a 50,000 watt standard broadcast facility and that, instead, a 250 watt facility should be granted either in Williamsburg—a small community which already has an existing radio station and probably cannot support a second, or in Suffolk—another small community which also already has a station, is nothing but a suburb of Norfolk, and

has few needs or interests of its own, apart from the needs and interests of the metropolitan area, which Appellant's station would serve. Thus, the Commission has made a major 307(b) determination, not on the basis of the standards set forth for such determinations in the Communications Act, but solely on the basis of the circumstance of a human error.

VI

The Entire System of Returning Applications for Real or Alleged Engineering Defects Is Not Only Arbitrary and Capricious, but Is Completely Unnecessary to the Proper Conduct of the Commission's Business

Contrary to the impression which the Commission's Memorandum Opinion and Order seeks to convey, the current system of summarily returning applications for real or alleged engineering mistakes is in no way necessary to the efficient conduct of the Commission's business. For many years, the Commission did not even designate applications for hearing—much less return them—without first giving applicants an opportunity to correct any obvious defects in an otherwise substantially complete proposal. It was only in 1964 that—in an obvious effort to circumvent and water down the important rights guaranteed to applicants by the *Ashbacker* doctrine, the Commission adopted the current system of summary returns.⁶ Prior to the adoption of the current system, the Commission followed the guidelines set forth by the Supreme Court in *Ashbacker* and, nevertheless, managed to process more AM applications each year than are processed at the present time.

Now, however, the Commission has converted the allocation of standard broadcast facilities into a game of "mistakesmanship". Important allocation decisions are being made, as they have been made in this case, not on the

⁶ See Report and Order in Docket No. 15,084, 29 F.R. 9492, 2 Pike & Fischer RR 2d 1658 (1964).

basis of the public interest, but rather on the basis of such extraneous and purely fortuitous circumstances as whether one engineer has made an error while another has not. Considerations of allocating the remaining few AM frequencies in accordance with the public interest, convenience, and necessity have been subordinated to the familiar bureaucratic shibboleth, "administrative convenience". So too, administrative convenience has come to outweigh due process of law. Applicants spend thousands of dollars and their engineers labor thousands of hours to produce complex engineering proposals designed to fulfill definite public needs; yet the Commission seems eager to dispose of these earnest efforts without ever considering them on their merits, simply by seeking out minor mistakes or readily curable defects and refusing applicants an opportunity to correct them.

The result of all this is that all too often, it is not the best proposal that survives the hurdles erected by the Commission, but rather the simplest proposal. Here, for example, Appellant's proposal was for a 50,000 watt station utilizing a complicated directional antenna, while Appellant's competitors filed proposals for low powered, 250 watt non-directional stations. Non-directional proposals are immensely simpler than directional proposals, and involve little opportunity for error. Yet obviously, the coverage possible with a 250 watt non-directional station is immensely less than is possible with a 50,000 watt station, and the flea power proposals submitted by Appellant's rivals will make a far less efficient use of a scarce frequency than would be made by a grant of Appellant's proposal.

If the Commission *must* have a system for punishing errant engineers, it should devise a system which will not—as does the present system—penalize the *public*. There are many alternatives. It could, for example, notify applicants when minor engineering errors are found and give them 15 days time in which to correct the errors, before dismissing their applications. Or it could require the payment of a

filing fee (perhaps, \$500.00) when an application is amended to correct such an error. Either of the foregoing alternatives should satisfy the Commission's penchant for imposing sanctions, without depriving the public of the benefits of having substantially complete applications considered on their merits, rather than on the basis of technicalities. Moreover, the second alternative, if adopted, would present quite a boon to the public treasury.

CONCLUSION

It is respectfully submitted that the Commission's actions herein were arbitrary, capricious and otherwise erroneous. For all of the foregoing reasons, the Commission's Memorandum Opinion and Order appealed from herein should be reversed, and the case remanded to the Commission with instructions to accept Appellant's application for filing *nunc pro tunc*, as of the date when it was originally tendered, May 27, 1966. Further, Appellant requests such other, further or different relief as to this Court shall seem just and proper.

Respectfully submitted,

JAMES RIVER BROADCASTING
CORPORATION

By Lauren A. Colby
Its Attorney



APPENDIX A

STATUTES INVOLVED

The relevant parts of the Statutes to which references are made in Appellant's brief follow:

Administrative Procedure Act of 1946, 5 U.S.C. § 1001, et seq., Section 10.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion —

(a) Right of Review. — Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof . . .

Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq., Section 309.

* * *

Section 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application —

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

App. 2

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis;

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply —

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for —

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under Section 310(b) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under Section 319(c) or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

App. 3

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to Section 325(b) where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of Section 308(a).

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or or any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which

allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under Section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein;

(2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act;

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by Section 606 of this Act.

*Proceedings To Enjoin, Set Aside, Annul, or
Suspend Orders of the Commission*

* * *

Section 402.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by Section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3) and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

* * *

Section 307.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * *

**RULES AND REGULATIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION**

§ 1.571 Processing of standard broadcast applications.—

[Groups of Applications]

(a) Applications for standard broadcast facilities are divided into three groups.

(1) In the first group are applications for new stations (except applications for new Class II-A stations) or for major changes in the facilities of authorized stations, i.e., any changes in frequency, power, hours of operation, or station location: provided, however, that the Commission may, within 15 days after the tender for filing of any application for other modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of § 1.580.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(3) The third group consists of applications for new Class II-A stations.

[Amendment of Application]

(b) If an application is amended so as to effect a major change as defined in paragraph (a)(1) of this section or so

App. 8

as to result in a transfer of control or assignment which, in the case of an authorized station, would require the filing of an application therefor on FCC Form 314 or 315 (See § 1.540), § 1.580 will apply to such amended application.

[Processing of Applications in General]

(c) Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) in this paragraph must be filed if they are to be grouped with any of the listed applications.

[Applications for Class II-A Stations]

(d) Applications for new Class II-A stations are placed at the head of the processing line and processed as quickly

App. 9

as possible. Action on such applications may be at any time more than 30 days after public notice is given of acceptance of the application for filing.

[Cross-reference]

(e) The processing and consideration of applications for new stations or major changes on those frequencies specified in § 1.569 are subject to certain restrictions, as set forth therein.

[Minor Applications]

(f) Applications other than those for new stations or for major changes in the facilities of authorized stations are not placed on the processing line but are processed as nearly as possible in the order in which they are filed.

[Applications for Modification of License]

(g) Applications for modifications of license to change hours of operation of a Class IV station, to decrease hours of operation of any other class of station, or to change station location involving no change in transmitter site will be considered without reference to the processing line.

[Designation for Hearing]

(h) If, upon examination, the Commission finds that the public interest, convenience, and necessity will be served by the granting of an application, the same will be granted. If, on the other hand, the Commission is unable to make such a finding and it appears that a hearing may be required, the procedure set forth in § 1.593 will be followed.

[Return to Processing Line]

(i) When an application which has been designated for hearing has been removed from the hearing docket, the application will be returned to its proper position (as determined by the file number) in the processing line. Whether or not a new file number will be assigned will be determined pursuant to paragraph (j) of this section after the application has been removed from the hearing docket.

[Amendment; New File Number]

(j) (1) A new file number will be assigned to an application for a new station, or for major changes in the facilities of authorized stations, when it is amended to change frequency, to increase power, to increase hours of operation, or to change station location. Any other amendment modifying the engineering proposal, except an amendment respecting the type of equipment specified, will also result in the assignment of a new file number unless such amendment is accompanied by a complete engineering study showing that the amendment would not involve new or increased interference problems with existing stations or other applications pending at the time the amendment is filed. If, after submission and acceptance of such an engineering amendment, subsequent examination indicates new or increased interference problems with either existing stations or other applications pending at the time the amendment was received in the Commission, the application will then be assigned a new file number and placed in the processing line according to the numerical sequence of the new file number.

(2) A new file number will be assigned to an application for a new station when it is amended to specify a change in ownership as a result of which one or more parties with an ownership interest in the original application do not have, on a collective basis, a 50 per cent or more ownership interest in the amended application.

(3) An application for changes in the facility of an existing station will continue to carry the same file number although an assignment of license or transfer of control of said licensee (permittee)-applicant has been consented to by the Commission, provided the application for changes in facility (FCC Form 301) is amended jointly by the assignor and assignee or transferor and transferee, upon consummation of the assignment or transfer, to reflect the ownership changes and to include the financial and programming proposals of the new licensee (permittee)-applicant.

App. 11

[Further Information]

(k) When an application is reached for processing, and it is necessary to address a letter to the applicant asking further information, the application will not be processed until the information requested is received, and the application will be placed in the pending file to await the applicant's response.

[Pending File]

(1) When an application is placed in the pending file, the applicant will be notified of the reason for such action.

[Temporary Freeze Lifted]

NOTE: No application tendered for filing after July 13, 1964, will be accepted for filing unless it complies fully with the provisions of new § 73.24(b) and new § 73.37 of this chapter, contained in the Commission's Report and Order, FCC 64-609 in Docket 15084, adopted July 1, 1964. No application accepted for filing after July 13, 1964 will be granted prior to August 13, 1964.

* * *

§ 1.522 Amendment of applications. — (a) Subject to the provisions of §§ 1.525 and 1.580, any application may be amended as a matter of right prior to the adoption date of an order designating such application for hearing, merely by filing the appropriate number of copies of the amendments in question duly executed in accordance with § 1.513. If a petition to deny (or to designate for hearing) has been filed, the amendment shall be served on the petitioner. See § 1.571(j) for the effect of certain amendments to standard broadcast applications.

(b) Requests to amend an application after it has been designated for hearing will be considered only upon written petition properly served upon the parties of record in accordance with § 1.47 and where applicable, compliance with the provisions of § 1.525, and will be granted only

for good cause shown. In the case of requests to amend the engineering proposal in standard broadcast applications (other than to make changes with respect to the type of equipment specified), good cause will be considered to have been shown only if, in addition to the usual good cause considerations, it is demonstrated that (1) the amendment is necessitated by events which the applicant could not reasonably have foreseen (e.g., notification of a new foreign station or loss of transmitter site by condemnation); (2) the amendment could not reasonably have been made prior to designation for hearing; and (3) the amendment does not require an enlargement of issues or the addition of new parties to the proceeding.

(c) Notwithstanding the provisions of paragraph (b) of this section, and subject to compliance with the provisions of § 1.525, a petition for leave to amend may be granted provided it is requested that the application as amended be removed from the hearing docket and returned to the processing line. See § 1.571(i).

* * *

§ 1.227 Consolidations. — (a) The Commission upon motion or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing:

(1) Any cases which involve the same applicant or involve substantially the same issues, or

(2) Any applications which present conflicting claims.

(b)(1) In broadcast cases, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended, if amended, so as to require a new file number, is substantially complete and tendered for filing by whichever date is earlier: (i) The close of business on the day preceding the day the previously filed application or one of the previously filed applications is designated for hearing; or (ii) the close of business on the day preceding the day design-

nated by public notice published in the Federal Register as the day any one of the previously filed applications is available and ready for processing.

NOTE: Subdivision (ii) of this subparagraph applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also § 1.571(c) and (h) and § 1.591(a).

(2) In non-broadcast cases other than common carrier cases, any application that is mutually exclusive with another application or applications already designated for hearing will be consolidated for hearing with such other application or applications only if the latter application in question has been filed within 5 days after public notice has been given in the Federal Register of the Commission's order which first designated for hearing the prior application or applications with which such application is in conflict.

(3) In common carrier cases, any application that is mutually exclusive with another previously filed application will be considered with such prior filed application only if the later filed application is substantially complete and tendered for filing prior to the close of business on the day preceding the day the earlier filed application is designated for hearing.

(4) Any mutually exclusive application filed after the date prescribed in subparagraphs (1), (2), or (3) of this paragraph will be dismissed without prejudice and will be eligible for refiling only after a final decision is rendered by the Commission with respect to the prior application or applications or after such application or applications are dismissed or removed from the hearing docket.

* * *

s 73.37 Minimum separation between stations; prohibited overlap. — (a) Except as indicated in other paragraphs of this section, and except for Class II-A stations, no application will be accepted for a new station (or change in

App. 14

frequency) if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph; and no application will be accepted for a change (other than a change in frequency) of the facilities of an existing station (including the daytime facilities of an existing Class II-A station) if the proposed change would involve such overlap in any area where there is not already such overlap between the stations involved:

<u>Frequency Separation</u>	<u>Contour of Proposed New Station (Class II-B, II-D, III, and IV)</u>	<u>Contour of Any Other Station</u>
Co-channel	0.005 mv/m	0.1 mv/m (Class I)
	0.025 mv/m	0.5 mv/m (Cl. II, III, IV)
	0.5 mv/m	0.025 mv/m (All Classes)
10 kc	0.5 mv/m	0.5 mv/m (All Classes)
20 kc	2 mv/m	25 mv/m (All Classes)
	25 mv/m	2 mv/m (All Classes)
30 kc	25 mv/m	25 mv/m (All Classes)

(b) An application for a new daytime station or a change in the daytime facilities of an existing station may be granted notwithstanding overlap of the proposed 0.5 mv/m contour and the 0.025 mv/m contour of another co-channel station, where the applicant station is or would be the first standard broadcast facility in a community of any size wholly outside of an urbanized area (as defined by the latest U.S. Census), or the first standard broadcast facility in a community of 25,000 or more population wholly or partly within an urbanized area, or when the facilities proposed would provide a first primary service to at least 25 percent of the interference-free area within the proposed 0.5 mv/m contour: provided, that:

(1) The proposal complies with paragraph (a) of this section in all other respects and is consistent with all other provisions of this part; and

(2) No overlap would occur between the 1 mv/m contour of the proposed facilities and the 0.05 mv/m contour of any co-channel stations.

(c) In determining overlap received, an application for a new Class IV station with daytime power of 250 watts, or greater, shall be considered on the assumption that both the proposed operation and all existing Class IV stations operate with 250 watts and utilize non-directional antennas. With respect to applications for new Class IV facilities, the provisions of paragraph (b) of this section shall be applied using the assumption mentioned in this paragraph for determining overlap received.

(d) If otherwise consistent with the public interest and subject to Section 316 of the Communications Act, an application requesting an increase in the daytime power of an existing Class IV station on a local channel from 250 watts to a maximum of one kilowatt, or from 100 watts to a maximum of 500 watts, may be granted notwithstanding overlap prohibited by paragraph (a) of this section. In the case of a 100 watt Class IV station increasing daytime power, the provisions of this paragraph shall not be construed to permit an increase in power to more than 500 watts, if prohibited overlap would be involved, even if successive applications should be tendered.

NOTE 1: The foregoing provisions of this section shall not be applied to applications for new Class II-A stations or to applications accepted for filing before July 1, 1964. With respect to such applications, the following shall apply: An authorization will not be granted for a station on a frequency of ± 30 kc/s from that of another station if the area enclosed by the 25 mv/m groundwave contours of the two stations overlap, nor will an authorization be granted for the operation of a station on a frequency ± 20 kc/s or ± 10 kc/s from the frequency of another station if the area enclosed by the 25 mv/m ground-wave contour of either one overlaps

the area enclosed by the 2 mv/m groundwave contour of the other. (As to overlap with Class II-A stations, see § 73.21, Note 2.)

NOTE 2: In the case of applications for changes (other than frequency) in the facilities of standard broadcast stations covered by this section, an application therefor will be accepted even though overlap of signal strength contours as mentioned in this section would occur with another station in an area where such overlap does not already exist, if: (1) the total area of overlap with that station would be reduced; (2) there would be no net increase in the area of overlap with any other station; and (3) there would be created no area of overlap with any station with which overlap does not now exist.

NOTE 3: The provisions of this section concerning prohibited overlap of signal strength contours will not apply where: (1) the area of such overlap lies entirely over sea water; or (2) the only overlap involved would be that caused to a foreign station, in which case the provisions of the North American Regional Broadcasting Agreement (NARBA) and the U.S./Mexican Agreement will apply. Where overlap would be received from a foreign station, the provisions of this section will apply.

§ 73.187 Limitation on daytime radiation.— (a) (1) Except as otherwise provided in subparagraphs (2) and (3) of this paragraph, no authorization will be granted, for Class II facilities if the proposed facilities would radiate, during the two hours after local sunrise and the two hours before local sunset, toward any point on the 0.1 mv/m contour of a co-channel US Class I station, at or below the pertinent vertical angle determined from Curve 4 of Figure 6 of § 73.190, values in excess of those obtained as provided in paragraph (b) of this section.

(2) The limitation set forth in subparagraph (1) of this paragraph shall not apply in the following cases:

(i) Any Class II facilities authorized before November 30, 1959; or

(ii) For Class II stations authorized before November 30, 1959, subsequent changes of facilities which do not involve a change in frequency, an increase in radiation toward any point on the 0.1 mv/m contour of a co-channel US Class I station, or the move of transmitter site materially closer to the 0.1 mv/m contour of such Class I stations.

(3) If a Class II station authorized before November 30, 1959, is authorized to increase its daytime radiation in any direction toward the 0.1 mv/m contour of a co-channel US Class I station (without a change in frequency or a move of transmitter site materially closer to such contour), it may not, during the two hours after local sunrise or the two hours before local sunset, radiate in such directions a value exceeding the higher of:

(i) The value radiated in such directions with facilities last authorized before November 30, 1959, or

(ii) The limitation specified in subparagraph (1) of this paragraph.

(b) To obtain the maximum permissible radiation for a Class II station on a given frequency ($f_{kc/s}$) from 640 kc/s through 990 kc/s, multiply the radiation value obtained for the given distance and azimuth from the 550 kc/s chart (Figure 9 of § 73.190) by the appropriate interpolation factor shown in the K500 column of paragraph (c) of this section; and multiply the radiation value obtained for the given distance and azimuth from the 1000 kc/s chart (Figure 10 of § 73.190) by the appropriate interpolation factor shown in the K1000 column of paragraph (c) of this section. Add the two products thus obtained; the result is the maximum radiation value applicable to the Class II station in the pertinent directions. For frequencies from 1010 kc/s to 1580 kc/s, obtain in a similar manner the proper radiation values from the 1000 kc/s and 1600 kc/s charts (Fig-

App. 18

ures 10 and 11 of § 73.190), multiply each of these values by the appropriate interpolation factor in the K'1000 and K'1600 columns in paragraph (c) of this section, and add the products.

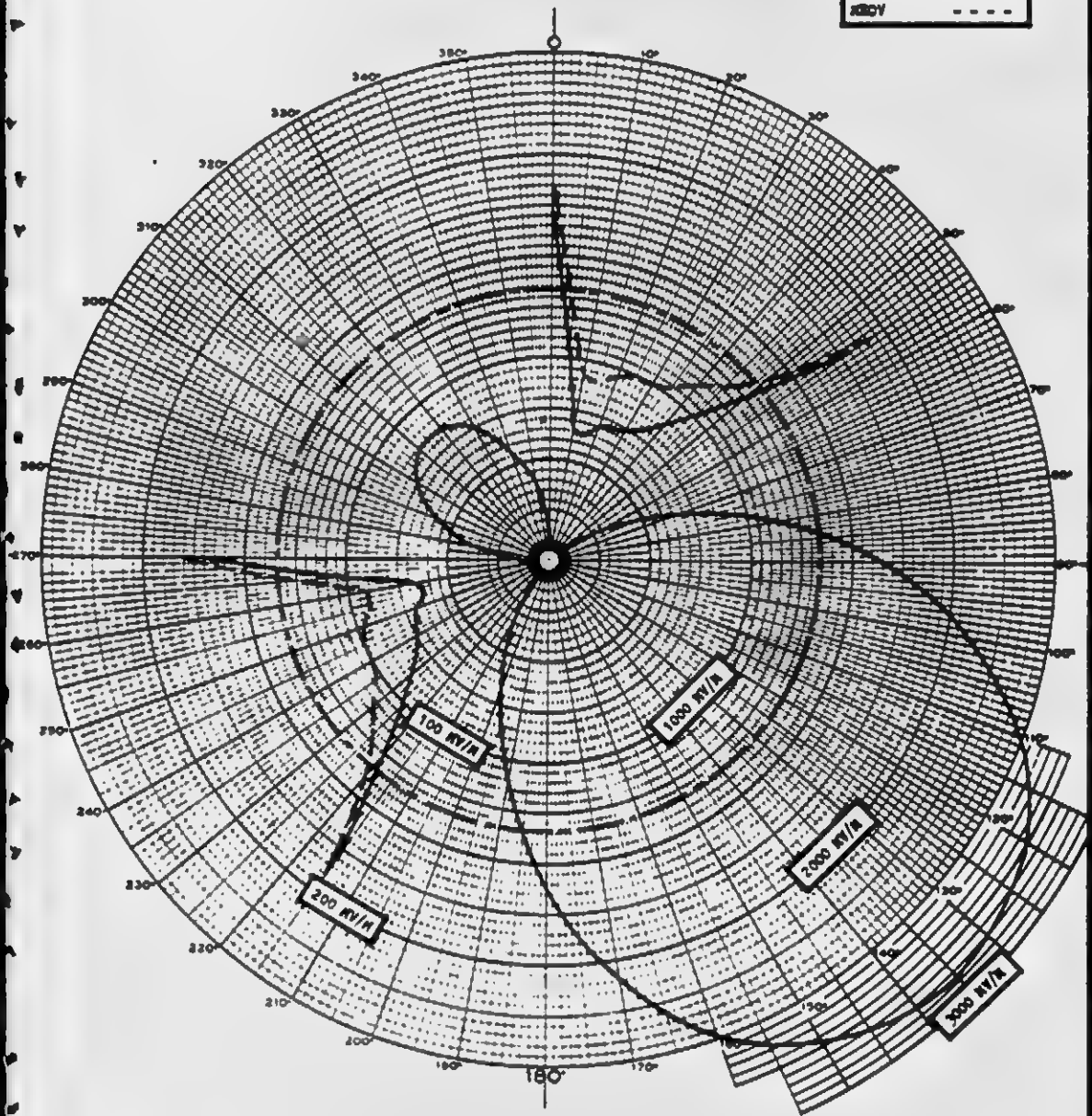
(c) Interpolation factors.

(1) Frequencies below 1000 kc/s.

$f_{\text{kc/s}}$	K500	K1000
640	0.720	0.280
650	0.700	0.300
660	0.680	0.320
670	0.660	0.340
680	0.640	0.360
690	0.620	0.380
700	0.600	0.400
710	0.580	0.420
720	0.560	0.440
730	0.540	0.460
740	0.520	0.480
750	0.500	0.500
760	0.480	0.520
770	0.460	0.540
780	0.440	0.560
800	0.400	0.600
810	0.380	0.620
820	0.360	0.640
830	0.340	0.660
840	0.320	0.680
850	0.300	0.700
860	0.280	0.720
870	0.260	0.740
880	0.240	0.760
890	0.220	0.780
900	0.200	0.800
940	0.120	0.880
990	0.020	0.980

Plate 1 - Before amendment

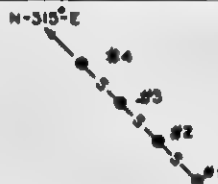
CALCULATED ———
RECV - - - -



$E_{RMS} = 1343 \text{ MV/M}$

LATITUDE $36^{\circ}57'15''$
LONGITUDE $76^{\circ}31'06''$

ANTENNA PARAMETERS



S-100°-248.3 FEET
G-895°-220 FEET

FIGURE 5

PROPOSED HORIZONTAL PATTERN

JAMES RIVER BROADCASTING CORPORATION

NORFOLK,

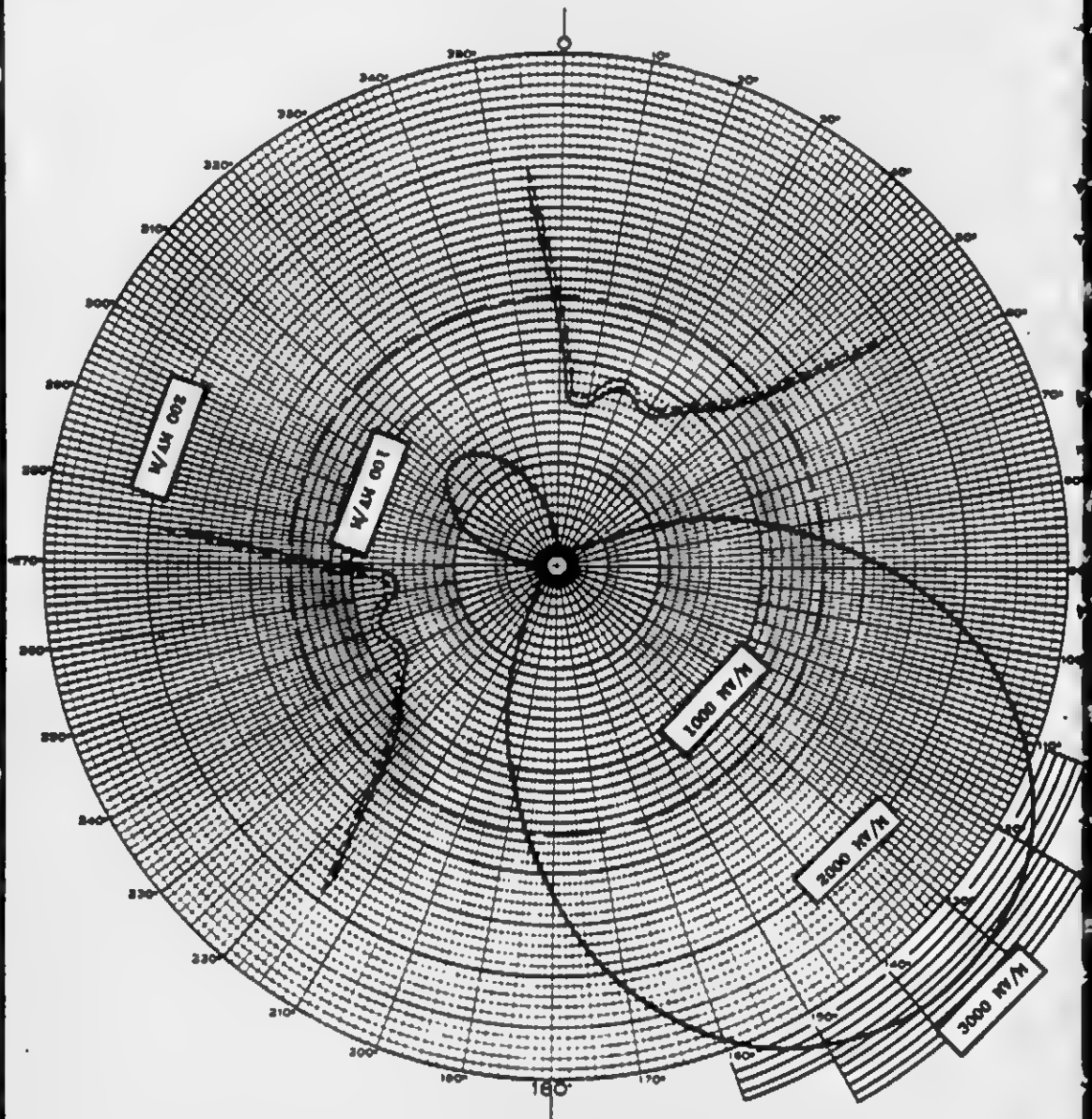
VIRGINIA

1110 KC

50 KW, DA-D

#1 1.000 / 0°
#2 2042 / 153.61°
#3 1577 / 309.04°
#4 0.4462 / 105.48°

Plate 2 - After amendment



$E_{RMS} = 1308 \text{ MV/M}$

LATITUDE: $36^{\circ}57'15''$
LONGITUDE: $76^{\circ}31'06''$

#1 1.000	0°
#2 1.967	151.16°
#3 1.539	304.01°
#4 0.4462	98.56°

ANTENNA PARAMETERS



8-100' = 248.3 FEET
8-88.5' = 220 FEET

FIGURE 3

PROPOSED HORIZONTAL PATTERN

JAMES RIVER BROADCASTING CORPORATION

NORFOLK, VIRGINIA

1110 KC

50 KW, DA-D



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,180

JAMES RIVER BROADCASTING CORPORATION.
Appellant.

v.

FEDERAL COMMUNICATIONS COMMISSION.
Appellee.

SUFFOLK BROADCASTERS.
KFAB BROADCASTING COMPANY.
Intervenors.

On Appeal from Memorandum Opinion and Order
of the Federal Communications Commission

**BRIEF FOR INTERVENOR
KFAB BROADCASTING COMPANY**

United States Court of Appeals
for the District of Columbia Circuit

JAMES A. McKENNA, JR.

VERNON L. WILKINSON

FILED NOV 16 1967

McKenna & Wilkinson
1705 DeSales Street, N.W.
Washington, D. C. 20036

William J. Paulson
CLERK

Counsel for
KFAB BROADCASTING COMPANY

(i)

STATEMENT OF QUESTIONS PRESENTED

The issues presented by the instant appeal, as agreed to in a prehearing stipulation accepted by the Court on October 13, 1967, are correctly set forth in appellant's opening brief.

INDEX

	<u>Page</u>
STATEMENT OF QUESTIONS PRESENTED . . .	i
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. The Commission's Action in Rejecting Appellant's Application as Originally Tendered was Neither Illegal Nor Capricious	2
II. The Commission's Refusal to Accord James River a Hearing on an Applica- tion Not Acceptable when Tendered and Not Corrected Until After an Ap- plicable Cut-Off Date was Neither Il- legal Nor Capricious	6
CONCLUSION	10

TABLE OF CASES

<i>Guinan v. Federal Communications Commission</i> 111 U.S. App. D. C. 371, 297 F. 2d 782 (1961)	9
<i>Harbenito Broadcasting Co. v. Federal Com- munications Commission</i> , 94 U.S. App. D. C. 329, 218 F. 2d 28 (1954)	3
* <i>Natick Broadcast Associates v. Federal Com- munications Commission</i> , Case, No. 20,834 U.S. App. D.C., decided November 7, 1967 . . .	2, 6
<i>Pittsburgh Radio Supply House v. Federal Com- munications Commission</i> , 69 App. D. C. 22, 98 F. 2d 303 (1938)	9

Table of Cases (Cont'd)

	<u>Page</u>
* <i>Ranger v. Federal Communications Commission</i> , 111 U.S. App. D. C. 44, 294 F. 2d 240 (1961)	2, 8
<i>Securities and Exchange Commission v. Chenery</i> , 332 U.S. 194 (1947)	7
* <i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192 (1956)	4, 8
<i>Wright v. Paine</i> , 110 U. S. App. D. C. 100, 289 F. 2d 766 (1961)	5

ADMINISTRATIVE DECISIONS

Cape Cod B/casting Corp., 7 RR 2d 509 (1966) . . .	2, 4
Report and Order, Docket No. 8333, 27 FCC 597, modified 27 FCC 690, reconsideration denied 27 FCC 825 (1959)	3
Report and Order, Docket No. 15084, 2 RR 2d 1658 (1964)	4

STATUTES AND REGULATIONS

Communications Act of 1934, 47 U.S.C. Sec. 151 *et seq.*

Sec. 154 (j)	8
Sec. 307 (b)	2, 8
Sec. 309 (e)	2, 8

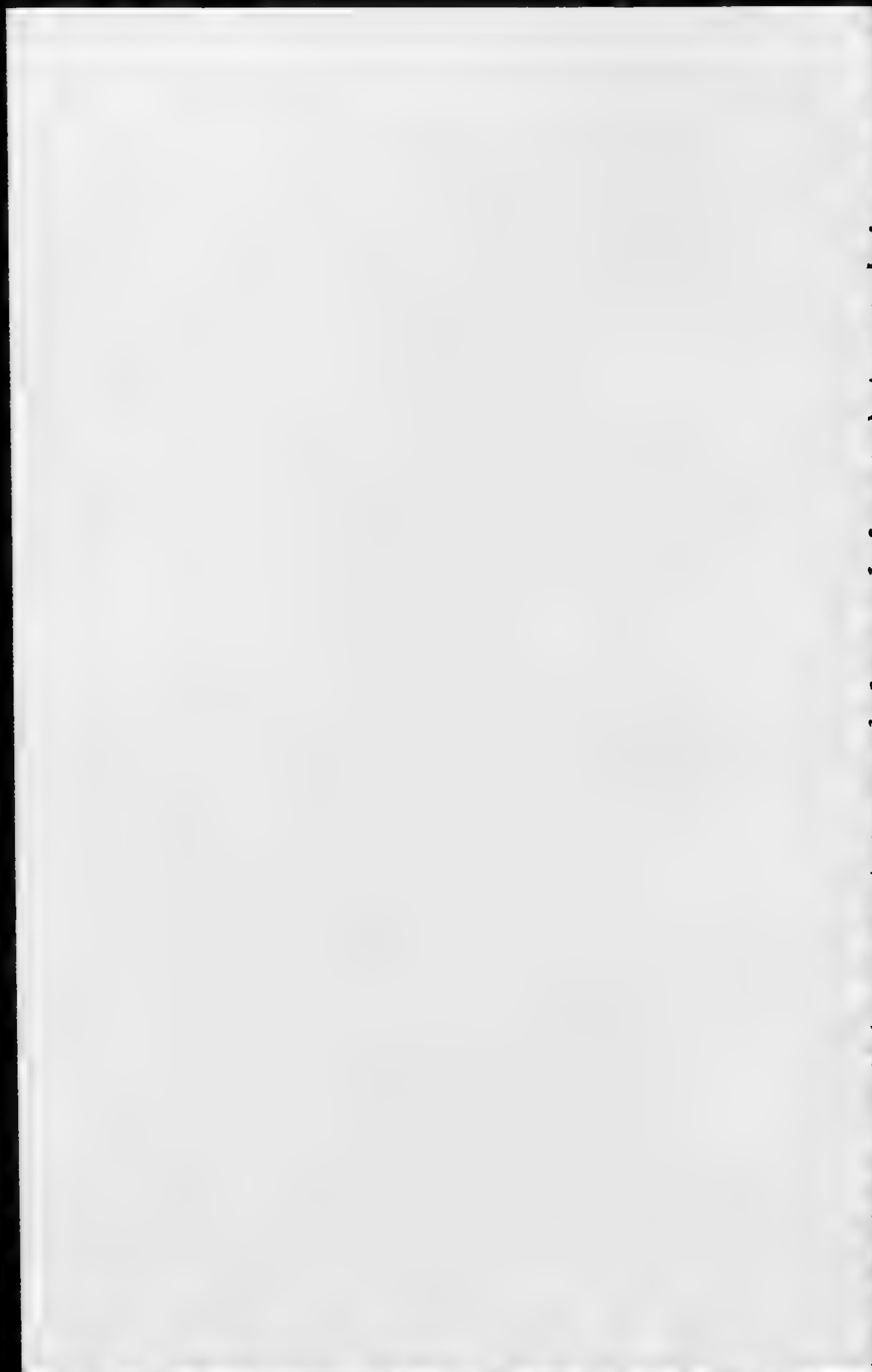
FCC Rules and Regulations:

Sec. 1.566 (a)	2, 5
Sec. 73.21 (a) (1)	3
Sec. 73.25 (b)	3
Sec. 73.37	2, 4, 5, 6

(v)

Statutes and Regulations (Cont'd)

	<u>Page</u>
FCC Rules and Regulations:	
Sec. 73.182 (a) (1)	3
Sec. 73.182 (v)	3
Sec. 73.187	3, 4, 5, 6
Sec. 73.187 (a) (1)	3
Sec. 73.190	3



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,180

JAMES RIVER BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

SUFFOLK BROADCASTERS,
KFAB BROADCASTING COMPANY,
Intervenors.

On Appeal from Memorandum Opinion and Order
of the Federal Communications Commission

**BRIEF FOR INTERVENOR
KFAB BROADCASTING COMPANY**

COUNTERSTATEMENT OF THE CASE

To avoid needless repetition, KFAB Broadcasting Company ("KFAB") adopts the Commission's Counterstatement of the case.

SUMMARY OF ARGUMENT

1. The James River application, as tendered May 27, 1966, concededly encroached upon KFAB's protected 0.1 mv/m groundwave contour. An application which contravenes the protection requirements of Rule 73.187 no less than those which violate Rule 73.37 is patently defective and unacceptable for filing. Rule 1.566(a); *Cape Cod Broadcasting Corp.*, 7 RR 2d 509, 512 (1966). Where, as here, an application demonstrably violates the overlap rules, "of course the application should be rejected." *Natick Broadcast Associates v. Federal Communications Commission*, Case No. 20,834 decided November 7, 1967 (slip op. p. 3).

2. The Commission's refusal to accord James River a hearing on an application not acceptable when tendered, and not subsequently cured until after a controlling cut-off date, was neither arbitrary nor capricious. Neither *Ashbacker*, nor Sections 307(b) or 309(e) of the Communications Act guarantee a hearing to a person who fails to submit an acceptable application by an applicable cut-off date. *Ranger v. Federal Communications Commission*, 111 U.S. App. D.C. 44, 46, 294 F. 2d 240 (1961).

ARGUMENT

I.

The Commission's Action in Rejecting Appellant's Application as Originally Tendered Was Neither Illegal Nor Capricious.

The frequency 1110 kc is a U.S. Class I channel, on which stations KFAB, Omaha, Nebr. (50 kw. U, DA-N) and

WBT, Charlotte, N.C. (50 kw, U, DA-N) are the two "dominant stations", each with Class I-B status (Rule 73.25(b)).¹ Any other operations on 1110 kc, present or proposed, are required to protect, in accordance with pertinent rules, the extensive "primary and secondary service" which the dominant stations on that channel are designed to render. Rule 73.21(a)(1); Rule 73.182(a)(1); Rule 73.182(v).

In 1959, after protracted proceedings dealing with the problem of "daytime skywave",² the Commission concluded that dominant Class I stations should be accorded additional protection against daytime skywave interference to their 0.1 mv/m *groundwave* contour during "critical hours" (two hours before sunset and two hours after sunrise). Rule 73.187; *Report and Order* in Docket No. 8333, 27 FCC 597, modified 27 FCC 690, *reconsideration denied*, 27 FCC 825 (1959).

As thus adopted in 1959, Rule 73.187(a)(1) provides, in categorical language, that "no authorization *will be granted* for Class II facilities if the proposed facilities would radiate, during the 2 hours after local sunrise and the 2 hours before local sunset, toward any point on the 0.1 mv/m [groundwave] contour of a co-channel U.S. Class I station, at or below the pertinent vertical angle determined from Curve 4 of figure 6 of Section 73.190, values in excess of those obtained as provided in paragraph (b) of this section".

¹ Their Class I-B status was confirmed in the first North American Regional Broadcasting Agreement (NARBA) entered into in 1937 and in subsequent extensions thereof. See Sen. Ex. Rept. 15, 75th Cong., 3d Sess., p. 18 (1938).

² See *Harbenito Broadcasting Co. v. Federal Communications Commission*, 94 U.S. App. D.C. 329, 218 F.2d 28 (1954).

"Protection of Class I-B channels from daytime skywave interference has always been a matter of prime concern", and as a result the "provisions of Section 73.187 have never [to date] been waived" *Cape Cod B/casting Corp.*, 7 RR 2d 509, 512 (1966).

And in 1964, so as to obviate the serious impact of multiple grants, even where the interference from a single grant seemed insignificant, the Commission adopted "go-no-go" rules which stated in effect that no applications for new or changed facilities (with exceptions not here material) would thereafter be *accepted for filing* where their interfering contours would overlap the normally protected contours of an existing facility (Rule 73.37). *Report and Order* in Docket No. 15084, 2 RR 2d 1658 (1964).

Although appellant argues (Br. pp. 11-12) that Rule 73.187 is couched in terms of "no application will be granted", whereas Rule 73.37 is phrased in terms of "no application will be accepted", this difference in phraseology is not, we submit, significant:

In the first place, the Supreme Court has made it clear that the Commission need not "waste time on applications" which contravene a rule and which, absent a persuasive waiver request, cannot be granted — with no waiver request submitted with the instant application inasmuch as interference to KFAB was here wholly ignored. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

Secondly, since the adoption of a "go-no-go" concept in 1964, the Commission has consistently returned applications which contravene the protection requirements of Rule 73.187 no less than those which violate Rule 73.37. See *Cape Cod B/casting Corp.*, 7 RR 2d 509, 512,

(1966).³ An agency's interpretation of its own rules is generally controlling. *Wright v. Paine*, 110 U.S. App. D.C. 100, 102, 289 F.2d 766 (1961).

Thirdly, Rule 73.37 is explicit that Class II stations on Class I channels (such as the 50 kw *daytime* application which appellant submitted on May 27, 1966) must not encroach upon the 0.1 mv/m *groundwave* contour of a Class I station such as KFAB. As shown by the engineering affidavit attached to KFAB's pleading of August 16, 1966 (R. 243-244),⁴ a matter conceded by appellant (Br. p. 3), the James River application as tendered on May 27 failed "to protect KFAB's groundwave 1 mv/m normally protected contour" during *portions* of the broadcast day. The application was, therefore, returnable under the express language of Rule 73.37.

Finally, applications "patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing" (Rule 1.566(a)). Since the application was one which would not be granted under Rule 73.187, it was "patently not in

³ With the opinion in that case released May 19, 1966, eight days before the James River application was tendered, appellant's engineering and legal counsel, specializing in communications matters, were thus on notice that an application in contravention of either Rule 73.37 or Rule 73.187 would be *returned*.

⁴ In that affidavit it was pointed out that KFAB's 0.1 groundwave contour lies approximately 832 miles from James River's proposed transmitter site, that to protect said contour James River "would be required to restrict radiation to approximately 546 mv/m" at the critical azimuth, whereas James River's pattern showed a radiation in excess of 600 mv/m (R. 243).

accordance with the Commission's rules" and thus defective.

The validity of the Commission's rules ordering applications to be returned where interference is caused to existing operations has been sustained by this Court. "If in fact Natick's proposed station is shown objectionably to violate the overlap rule, of course the application should be rejected." *Natick Broadcast Associates v. Federal Communications Commission*, Case No. 20,834 decided November 7, 1967 (slip op. p. 3). Thus, as borne out by the staff's letter of November 2, 1966 (R. 284) and on review thereof by the Commission (R. 350-355), KFAB was on sound ground when it asked in its pleading of August 16, 1966 that the James River application "be returned to the applicant forthwith as contravening Rule 73.37 and Rule 73.187" (R. 242).

II.

The Commission's Refusal to Accord James River a Hearing on an Application Not Acceptable when Tendered and Not Corrected until after an Applicable Cut-Off Date Was Neither Illegal Nor Capricious

On August 19, 1966, in an effort to eliminate the interference which the application as originally tendered on May 27, 1966 would cause to KFAB, James River submitted a revised pattern (R. 246-276). Though appellant would have this Court believe that these changes were miniscule (Br. p. 7; App. pp. 19-20), they were in fact significant. For example, the horizontal pattern as amended showed the RMS reduced from 1343 mv/m to 1308 mv/m (App. 19-20). The field ratios and related phases of the several towers were

modified; the nulls were changed; and the radiation in the minor lobe toward KFAB was reduced (App. 19-20). And although KFAB's engineer, in his August 4 affidavit, had called appellant's attention to missing MEOV data, James River did not rectify that deficiency in the amended pattern submitted August 19, 1966 (see App. Br. App. 20).⁵

In refusing to allow James River, by amendments submitted after the cut-off date to transform an unacceptable into an acceptable application, the Commission and its staff were giving effect to entirely appropriate rules and concepts. As the staff (acting under delegated authority) pointed out in its letter of November 2, 1966, the James River application, as tendered May 17, 1966 "did not protect the KFAB 0.1 mv/m contour during critical hours and therefore was not acceptable for filing at the time the application was submitted". Since the application was unacceptable on May 31, 1966 when a mutually exclusive proposal received "cut-off" protection, it was "not timely

⁵ Accordingly, in a rebuttal pleading and accompanying engineering affidavit filed August 30, 1966, KFAB denied that the August 19 amendment removed the interference problems outlined in KFAB's original pleading (R. 277-282). Since the Commission's staff (R. 284) and thereafter the Commission (R. 350-355) seemingly chose to treat the August 19, 1966 amendment as taking care of the KFAB interference problem, it must be *here* assumed under the *Chenery* doctrine that the amendment did in fact eliminate said interference. *Securities and Exchange Commission v. Chenery*, 332 U.S. 194, 196 (1947). And we will not *here* argue the contrary. However, in the process of amending an application to eliminate one problem, the changes not infrequently give rise to other problems, which in turn can necessitate still further pleadings and amendments (see R. 277-282). This fact should be borne in mind in passing on the Commission's action calling a halt to all amendments submitted after the cut-off date designed to transform an unacceptable into an acceptable application.

filed and must be returned" (R. 284).⁶ And since the interference to KFAB rendered the application unacceptable, "no further studies were made [by the staff] to determine if other problems are involved which would preclude acceptance of the application" (R. 284).

With all deference to appellant's contrary assertions (Br. pp. 6, 10-11, 14), neither *Ashbacker* (326 U.S. 327) nor 47 U.S.C. Sec. 309(e) guarantee a hearing to a person who fails to submit an acceptable application by an applicable cut-off date. *Ranger v. Federal Communications Commission*, 111 U.S. App. D.C. 44, 46, 294 F.2d 240 (1961); cf. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). And the *Ranger* case makes it clear that efforts to correct such deficiencies *nunc pro tunc* may be rejected by the Commission in the interest of giving effect to its cut-off rules and of expeditiously discharging its functions.⁷

To contend, as appellant does (Br. p. 14), that the failure to accord James River a hearing with timely filed applications contravenes Section 307(b) of the Act (47 U.S.C. Sec. 307(b)) would, if sound, preclude all "cut-off" rules. This Court has repeatedly sustained the Commission's refusal to entertain untimely applications, without

⁶ Although the November 2 letter contains an assertion that the application "became acceptable" on August 19, as a result of the amendment of that date, it should be noted that KFAB's *rebuttal* pleading of August 30 was not listed among those there being considered and was thus apparently overlooked (R. 284).

⁷ It is to be borne in mind that Congress has expressly empowered the Commission to "conduct its proceedings in such manner as will best conduct to the proper dispatch of business and to the ends of justice." 47 U.S. C. Sec. 154(j).

comparing their relative merits. *Guinan v. Federal Communications Commission*, 111 U.S. App. D.C. 371, 374, 297 F.2d 782, 785 (1961); *Pittsburgh Radio Supply House v. Federal Communications Commission*, 69 App. D.C. 22, 98 F.2d 303 (1938).

This Court's recent decision in *Natick, supra*, is not to the contrary. As this Court there pointed out (slip op. p. 2), "the original complete application filed by Natick on the cut-off day . . . did not violate the overlap rule", a fact borne out by subsequent measurements. Here, appellant concedes (Br. p. 3) that the James River application as tendered on May 27 and as it existed on the May 31, 1966 cut-off date did cause skywave interference to KFAB. Under those circumstances, where in fact the application is shown to violate the overlap rule, "of course the application should be rejected" (slip op. p. 3). Here, with the existence of overlap on the cut-off date conceded, no remand is required.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Commission's refusal to entertain the James River application should be affirmed.

Respectfully submitted,

JAMES A. McKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson
1705 DeSales Street, N.W.
Washington, D. C. 20036

*Counsel for KFAB Broadcasting
Company*

NOVEMBER 16, 1967



BRIEF FOR INTERVENOR
SUFFOLK BROADCASTERS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,180

JAMES RIVER BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

SUFFOLK BROADCASTERS AND
KFAB BROADCASTING COMPANY,

Intervenors.

APPEAL FROM MEMORANDUM OPINION AND ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 16 1967

Nathan J. Paulson
CLERK

William P. Bernton
621 Colorado Building
Washington, D. C. 20005

Attorney for Intervenor
SUFFOLK BROADCASTERS

STATEMENT OF QUESTION PRESENTED

The question presented, as agreed to by the parties in a stipulation approved by order of the Court, is correctly stated in the Brief of the Appellant.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF QUESTIONS PRESENTED	(i)
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE ACTION COMPLAINED OF WAS TAKEN PURSUANT TO THE AUTHORITY OF VALID RULES OF THE COMMISSION	5
II. THE COMMISSION'S AUTHORITY WAS NOT EXERCISED IN AN ARBITRARY OR CAPRICIOUS MANNER	12
III. THE RULE OF THE ASHBACKER CASE DOES NOT INVALIDATE THE PERTINENT RULES OR THE ACTION TAKEN UNDER THEM	17
IV. OTHER ARGUMENTS OF APPELLANT ARE NOT RELEVANT AND RAISE NO COGNIZABLE LEGAL QUESTION	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:

<u>Ashbacker Radio Corporation v. F.C.C.,</u> 326 U.S. 327; 66 S. Ct. 148 (1945)	4, 17, 18
<u>Century Broadcasting Corp. v. F.C.C.,</u> 114 U.S. App. D.C. 59; 310 F. 2d 864 (1962)	3, 11, 17
<u>Natick Broadcast Associates, Inc. v. F.C.C.,</u> U.S. App. D.C., No. 20,834, Slip Opinion, 11/7/67	15
<u>National Broadcasting Co. v. United States,</u> 319 U.S. 190; 63 S. Ct. 997 (1946)	3, 6, 7
<u>Ranger, et al., v. F.C.C.,</u> 111 U.S. App. D.C. 44; 294 F. 2d 240 (1961)	3, 11, 16
<u>United States, et al. v. Storer Broadcasting</u> <u>Company, 351 U.S. 192; 76 S. Ct. 763 (1956)</u>	3, 4, 7, 17, 18

STATUTES:

Communications Act of 1934, 48 Stat. 1064, as amended,
47 U.S.C. 151, et seq.:

Section 303 5
Section 309 17

Rules and Regulations of the Federal Communications
Commission, 47 Code of Federal Regulations:

Section 1.227 3, 8, 9, 11, 14, 15, 16
Section 1.522 11, 14
Section 1.564 9, 10, 19
Section 1.566 3, 7, 8, 9, 10, 13, 19
Section 1.571(j)(2) 19
Section 73.35 7
Sections 73.131-73.139 7
Section 73.187(a) 3, 5, 6, 12, 13

ADMINISTRATIVE DECISIONS:

Fine Music, Inc., 9 Pike and Fischer RR 2nd,
219 (1966) 15

Johnson Broadcasting Company, 5 Pike and
Fischer RR 1326 (1960) 9

Lawrence A. Harvey, 9 Pike and Fischer
RR 636 (1953) 10

Lou Poller, 9 Pike and Fischer RR 531 (1953) 10

Middleboro Broadcasting Co., Inc.,
3 Pike and Fischer RR 273 (1946) 10

Teleservice Company, 17 Pike and Fischer RR 980 (1958) 9

OTHER AUTHORITIES:

Comments of the Commission concerning Section 1.566
of its Rules, Pike and Fischer RR, Current
Service (**) 8, 13

Memorandum Opinion and Order of December 9, 1959 in
Docket No. 8333, released December 11, 1959,
18 Pike and Fischer RR 1858b 13

Proposed Report and Order of March 11, 1954 in
Docket No. 8333, released March 12, 1954, 10
Pike and Fischer RR 1541 13

Page

OTHER AUTHORITIES [Continued]:

Report and Order of April 8, 1959, FCC 59-315, released April 9, 1959, 18 Pike and Fischer RR 1565	14
Report and Order of September 18, 1959 in Docket No. 8333, released September 22, 1959, 18 Pike and Fischer RR 1845	5
Supplemental Report and Order of October 21, 1959 in Docket No. 8333, released October 28, 1959, 18 Pike and Fischer RR 1857	13

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,180

JAMES RIVER BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

SUFFOLK BROADCASTERS AND
KFAB BROADCASTING COMPANY,

Intervenors.

APPEAL FROM MEMORANDUM OPINION AND ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR
SUFFOLK BROADCASTERS

COUNTERSTATEMENT OF THE CASE

Although this intervenor finds appellant's Statement of the Case argumentative it will, in the interests of brevity, rely on the Counterstatement to be filed by the appellee rather than attempting to restate the case in full.

The Court should, however, be advised of two instances where there is disagreement relating to the facts:

1) Although appellant contends that its amendment cured the defect that caused its application to be returned, the affected station (KFAB) does not concede that this is the case and has so advised the Commission and this Court by pleadings filed in the proceeding before the Commission and in this appeal.

2) In Footnote 1 to its Statement of the Case appellant argues, wholly erroneously, that Commission action allowing the amendment of this intervenor's application "has allowed the filing of what amounts to a completely new application after the 'cut off' date" and thus afforded this intervenor different treatment from that given appellant. The facts with respect to the amendment of intervenor's application are as follows:

This intervenor's interest in this proceeding is based on an application that, at the time this appeal was brought, was pending before the Federal Communications Commission in the style of "Charles E. Springer and Rosa Mae Springer, d/b as Suffolk Broadcasters". The Springers, although husband and wife, had been prosecuting the application as co-partners (50% each) but, at the time of this intervenor's intervention herein, Charles E. Springer had died; and intervention was made by "Rosa Mae Springer, widow of Charles E. Springer and surviving partner of Charles E. Springer and Rosa Mae Springer, d/b as Suffolk Broadcasters".

Subsequent to this intervention, Rosa Mae Springer filed with the Commission a petition showing that, in addition to being a surviving partner, she was also the sole beneficiary and Executrix of Charles E. Springer's estate. Upon this showing, the Commission

entered an order changing the caption of the application to "Rosa Mae Springer". (FCC 67 M-1613; Mimeo 6984, released September 28, 1967).

The regulatory basis for this Commission action, and the facts distinguishing this situation from appellant's are set out infra, at page 19.

SUMMARY OF ARGUMENT

Appellant's application was returned to it pursuant to Section 1.566 of the Commission's rules because it was defective in that it failed to protect co-channel Station KFAB from daytime skywave interference as required by Section 73.187(a) of the Commission's rules. The Commission's refusal to consider the allegedly curative amendment filed after the "cut-off date" was a valid exercise of its authority under Section 1.227 of its rules. The Commission's right to reject applications which do not conform to its rules was recognized both in National Broadcasting Co. v. U.S., 319 U.S. 190; 63 S. Ct. 997 (1946) and U.S., et al. v. Storer Broadcasting Company, 351 U.S. 192; 76 S. Ct. 763 (1956). Its right to impose cut-off rules against such applications was specifically recognized by this Court in Ranger, et al. v. F.C.C., 111 U.S. App. D.C. 44: 294 F. 2d 240 (1961) and Century Broadcasting Corp. v. F.C.C., 114 U.S. App. D.C. 59: 310 F. 2d 864 (1962).

The authority which the Commission thus exercised was not exercised in an arbitrary or capricious manner. Section 73.187 was adopted only after a lengthy and arduous proceeding. The Commission's action returning appellant's application because of a violation of that section was squarely within the purview of Sec. 1.566, which was adopted to give the Commission the power to return patently defective applications.

The Commission's enforcement of the "cut-off" rule against appellant's tardily tendered amendment was, again, squarely within the intendment of that rule as evidenced by the language of the Commission in the Report and Order adopting the rule.

There is nothing in the doctrine of the Ashbacker case (326 U.S. 327; 66 S. Ct. 148 (1945)) that precludes the Commission from dismissing appellant's application without a hearing. The language of the Supreme Court in U. S. et al., v. Storer Broadcasting Company (supra), makes it clear that the Commission could reject appellant's application and deny its request for waiver of the "cut-off" rules without a hearing.

The other arguments raised by appellant raise no questions which are cognizable in this proceeding.

ARGUMENT

I

THE ACTION COMPLAINED OF WAS TAKEN PURSUANT TO
THE AUTHORITY OF VALID RULES OF THE COMMISSION

The power of the Federal Communications Commission to promulgate rules relating to interference between stations is one of the powers expressly granted to it by the Communications Act of 1934, as amended. Section 303 of that Act (47 USC 303) entitled "Powers and Duties of Commission", clearly delegates this authority to it. ^{1/}

Pursuant to that section, the Commission, on March 8, 1947, adopted a Notice of Proposed Rule Making to investigate the type of interference known as "daytime skywave interference" and to determine whether it was of such significance as to require regulation.

The final Report and Order in this proceeding was not released until September 18, 1959. (18 Pike and Fischer RR 1845). The Commission there held that Class I stations should be afforded a degree of protection from the daytime skywave interference caused by co-channel Class II stations during the transitional periods of the day (i.e., two hours before sunset and two hours after local sunrise) and issued rules to implement this decision. Among the rules so adopted was Section 73.187(a) which reads in pertinent part:

"....no authorization will be granted for Class II facilities if the proposed facilities would radiate, during the two hours after local sunrise and the two

^{1/} "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall —

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter....."

hours before local sunset, toward any point on the 0.1 mv/m contour of a co-channel U.S. Class I station, at or below the pertinent vertical angle determined from Curve 4 of Figure 6a of Sec. 73.190, values in excess of those obtained as provided in paragraph (b) of this section."

The Memorandum Opinion and Order here appealed from holds, and appellant admits, that appellant's application as originally tendered, violated this provision of the rules by proposing radiation towards co-channel station KFAB, Omaha, Nebraska, in excess of that permitted thereby.

Appellant points out that, although the above quoted language prohibits the "granting" of an application in violation of the rule, it does not specifically prohibit the "acceptance" of such an application and it argues that the Commission, therefore, had no authority to return its application. This position is completely illogical and is also contrary to the prior construction of similar statutory language.

There can be no reason, and none was offered by appellant, to place the Commission in the position of having to accept and process an application which cannot be granted or, if the defective application is mutually exclusive with one which had been prepared in compliance with the Commission's rules, to force the other applicant to a time consuming, expensive and unnecessary hearing.

Moreover, Section 73.187 is not the only Commission rule whose language prohibits the "granting" of an application that does not comply with its terms. There are other rules which speak in similar terms: and these rules have been construed as precluding the acceptance of non-complying applications. See National Broadcasting Co. v. United States, 319 U.S. 190; 63 S.Ct. 997 (1946) which, as the dissenting opinion pointed out, gave the right to the

Commission to reject applications in violation of its similarly worded "Chain Broadcasting" rules, ^{2/} cited with approval in United States et al. v. Storer Broadcasting Company, 351 U.S. 192, 204; 76 S.Ct. 763, 771 (1956) which was a case involving the Commission's "Multiple Ownership" rules which, again, have the same language. ^{3/}

Appellant also argues, at page 12 of its brief, that "the Commission has no Rule requiring or providing for the return of an application because of 'daytime skywave interference'". However, such a rule does in fact exist. Section 1.566 specifically provides for the return of all defective applications and also states the conditions which must be satisfied before a defective application can be considered acceptable for filing:

"Defective applications. - (a) Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof".

2/ The Chain Broadcasting rules encompass some nine sections of the Commission's Rules and Regulations, Sec. 73.131-73.139, all under the heading of "Licensing Policies". Eight of these sections prohibit the "granting" of the license or renewal of license applied for if the applicant is in violation of the section. The ninth section, Sec. 73.137, employs the phrase "no license shall be issued" but no distinction was made in National Broadcasting due to this difference in wording.

3/ Section 73.35 of the Commission's Rules (The Multiple Ownership Rule) begins with the following language: "No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:....."

That the Commission fully intended that this section would be strictly applied is shown by its comments made when amending former Section 1.361(c) to the present Section 1.566(a).

"2. Subparagraph (c)... now permits the filing of an application not 'in accordance with the Commission's rules' if it is accompanied by either a petition to amend or a request for waiver of the conflicting rule. It is the Commission's opinion that this provision should be revised so as to preclude the filing of applications in conflict with the rules even though accompanied by petitions for appropriate rule making. It is believed such a revision will promote more orderly procedure and particularly, will eliminate the pendency before the Commission of applications which cannot be acted upon for extended periods because of their interrelation with complex, unresolved rule making proceedings". 4/

The above comments by the Commission clearly illustrate the importance it gave to this section of its rules. In an effort to provide for a more orderly and efficient framework for the handling of the many applications it receives, the Commission tightened up the section dealing with defective applications and placed the burden of insuring that applications comply with its rules and policies exactly where it belongs: on the applicant, himself. This is a burden which appellant, admittedly failed to meet.

* * *

Appellant also contends that, because its application was "substantially complete" when tendered for filing, it was error on the part of the Commission to refuse to accept it.

Section 1.227 of the Commission's Rules (set out at App., p. 12 of appellant's brief) does, of course, provide that applications that are "substantially complete and tendered for filing" prior to the

4/ These comments may be found in Pike and Fischer Radio Regulation, Current Service (***) at page 51:282.

"cut off" date shall be consolidated with other, mutually exclusive, applications on file and being "cut off" on that date. This is merely an extension of Section 1.564(a) of the rules (see Appendix, page I , infra) which states that an application which is "complete or substantially complete" will be accepted for filing. This section, however, is solely concerned with situations in which there are only "minor defects as to completeness" and neither section has any bearing on situations where, as the Commission determined was the case in this instance, the application is "patently not in accordance with the Commission's rules". This is stated in unambiguous language in Paragraph (b) of Section 1.564 which provides:

"Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the Commission's administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the Commission's rules". (emphasis supplied)

The Commission's policy with respect to applications found to be "patently not in accordance with the Commission's rules" has been codified as Section 1.566 of the rules, discussed above, which provides that such applications will not be accepted for filing and, if inadvertently accepted, will be dismissed. Thus, the rules themselves make it clear that, even if an application is "substantially complete"; it will still not be accepted, and cannot therefore be consolidated under Section 1.227, if it is "patently not in accordance with the Commission's rules".

The cases cited by appellant are, therefore, all wholly inapplicable to the situation at hand. Teleservice Company, 17 Pike and Fischer RR 980 (1958) and Johnson Broadcasting Company,

5 Pike and Fischer RR 1326 (1960) merely involved defective verifications. Lou Poller, 9 Pike and Fischer RR 531 (1953), was concerned with the applicant's financial qualifications; and the Commission specifically held that there were no major defects in the application to preclude its acceptance for filing. Similar situations were involved in Lawrence A. Harvey, 9 Pike and Fischer RR 636 (1953) and Middleboro Broadcasting Co., Inc., 3RR 273 (1946), which involved such minor defects as failure to give the exact address of the proposed studio and minor variations in the transmitter site coordinates. All of the above cases were perfect examples of situations covered by Section 1.564; and certainly would not fall within the scope of Section 1.566. Appellant has not shown any situation where the violation of a technical standard has been held to be a "minor defect....as to completeness", excessable under Section 1.564.

It is interesting to note that appellant's brief never spoke to Section 1.566, although this was the very section upon which the Commission relied to return its application:

"In summary, we find that, since the proposal as originally tendered violated Section 73.187, it was 'patently not in accordance with the Commission's Rules' within the meaning of Section 1.566 and was properly returned as unacceptable". 5/

Appellant has decided that it would rather attempt to show that its application was substantially complete under Section 1.564 than face the problems of Section 1.566; - especially since it has admitted that the application was in violation of the daytime sky-wave interference rules and it never requested a waiver of that rule. The controlling rule is, however, Sec. 1.566.

5/ Commission Memorandum Opinion and Order, Record, p. 352

* * *

Equally erroneous is appellant's attempt to rely on Section 1.522 of the Commission's Rules (erroneously referred to at p. 11 of appellant's brief as Section 1.511, and set out in pertinent part at p. 11 of appellant's appendix) Appellant admittedly was entitled to amend its application as a matter of right at any time prior to the time it was designated for hearing. However, the right to amend which is granted by Section 1.522 has never been held to provide a means of avoiding the impact of the "cut off" provisions of Section 1.227. (Appellant's appendix, p. 12)

Section 1.227 has been upheld by this Court as a valid exercise of the Commission's rule-making authority. Ranger, et al. v. F.C.C., 111 U.S. App. D.C.44;294 F.2d 240 (1961); Century Broadcasting Corp. v. F.C.C., 114 U.S. App. D. C. 59, 310 F. 2d 864 (1962). As will be shown in Part II of the Argument, *infra.*, one of the basic reasons for the amendment of Section 1.227 (then Section 1.106) was to "freeze" all applications as of their pertinent "cut off" dates so that, in the subsequent processing the Commission staff would not have to be concerned with subsequently-filed amendments, such as the one in the instant case, which change the proposals from the one on file on the "cut off" date.

It is, therefore, clear that the action of which appellant complains was premised on rules of the Commission which have been upheld by the Court and that the other rules which appellant seeks to invoke in support of its position are not, in fact, germane to the situation at hand.

II

THE COMMISSION'S AUTHORITY WAS NOT EXERCISED
IN AN ARBITRARY OR CAPRICIOUS MANNER

The Commission's promulgation of Section 73.187 of its Rules resulted from a detailed and lengthy consideration of every aspect of the problems of daytime skywave interference. All standard broadcast stations radiate both skywave and groundwave signals at all times. During the middle of the day, the interference from skywave radiation is negligible. At night, however, when the ionosphere approaches closer to the earth's surface, the skywave radiations are reflected by the ionosphere to distances beyond those reached by the station's groundwaves. Thus, interference problems are greatly compounded at night. This phenomenon forced the Commission to develop different protection requirements for standard broadcast stations during daytime and nighttime hours, with many more stations licensed to operate during the daytime hours than at night. However, since skywave radiation is also present during the transitional hours around sunrise and sunset, and since it is different during those hours than during nighttime hours, the protection requirements imposed for nighttime operations were not applicable to those transitional periods. Accordingly, different protection standards were indicated for those periods; and it was those standards that were incorporated into Sec. 73.187.

The proceeding leading to the adoption of Sec. 73.187 was one of the most deliberate ones in the history of the Commission. It was only after lengthy study that it was determined that this type of regulation was desirable at all; and it was at this point

that the Commission issued a Proposed Report and Order (10 Pike and Fischer RR 1541) Then, after another lengthy period of consideration, the Commission promulgated Section 73.187. However, even this was not the final step. In order to best determine what the public interest required, the Commission reconsidered its action and made several changes (none pertinent here) in the new rules. (18 Pike and Fischer RR 1857). The Commission then entertained and acted on petitions for reconsideration from interested parties. (18 Pike and Fischer, RR 1858b).

In light of the above the Commission's action in adopting Sec. 73.187 was anything but arbitrary and capricious. This section, which is designed to implement the realization of fuller benefits from the complex radio communications system, is the one with which appellant failed to comply and which the Commission, in rejecting appellant's application, sought to protect.

* * *

Nor can it be said that the Commission acted arbitrarily and capriciously when it returned appellant's application as "patently not in accordance with that rule. As can be seen from the Commission's comments upon the occasion of amending the old rule to the present Sec. 1.566, this was exactly the type of situation to which this provision was intended to apply:

"3. It is believed desirable at this time to clear up an ambiguity which may exist with respect to this provision. It is applicable only to applications which, because of the nature of the particular rule involved, can be patently seen to be in conflict with the rule. Where the conflict can be determined

only after a hearing evaluating various pertinent factors, this procedural provision is inapplicable."^{6/}(Emphasis Supplied).

* * *

By the same token, there was nothing arbitrary or capricious in the Commission's refusal to waive its "cut-off" requirement to give retroactive effect to the allegedly curative amendment which appellant had filed after the cut-off date.

In the Report and Order by which it amended Sec. 1.227 of its rules (then Sec. 1.106) to its present form (18 RR 1565, 1566), the Commission pointed out that one of the reasons why a new "cut-off" procedure was imperative was that the constant amendment of applications supposedly ready for processing was requiring that such applications be re-processed time and again:

"4. Further, since under ~~§1.311~~^{6a/} of the Rules an application may be freely amended as a matter of right at any time before it is designated for hearing, reprocessing of an application under consideration has been necessary because of amendments not only to other applications but even to the very application itself. Thus, it has not been uncommon that an application had to be reprocessed many times before action could be taken thereon because of new filings and amendments to pending applications. Indeed, it appears that for several months the Commission's staff has been engaged in the constant reprocessing of the same 400 or so applications, which either have been taken from the top of the processing line or have been grouped for study with the older applications because of conflicts, with little or no hope that the various groups of conflicting applications may be designated for hearing so long as amendments continue to be filed. For each amendment affecting radiation, however minor, requires further study to determine whether new conflicts have been created or some existing conflicts may have been resolved. As an example, during a recent 30 day period more than 300 applications were at least partially processed by the engineering staff to determine

^{6/} See fn. 4, supra, at p.8.

^{6a/} The precursor section of Sec. 1.522, supra

the effect of amendments or new filings on interference conditions. During that same period only 33 applications were placed on the Commission's agenda, and, more significantly, although not a single application was removed from the top of the processing line, the number of applications under study increased because of the necessity of grouping additional applications with those already under study.

"5. The situation outlined above has seriously impaired the handling of applications for new or changed standard broadcast facilities, and has been very wasteful of the time of the Commission's staff. It is now clear that there can be no improvement in the status of the processing line unless applications may be processed to a conclusion without interruption and the necessity of reprocessing because of new filings and amendments to pending applications, including those in the processing stage." (Emphasis Supplied).

It can, therefore, be truthfully said that the instant situation, which involved an amendment that would have changed the radiation of an application that was supposedly ready for processing, poses the very problem which the present Sec. 1.227 was designed to prevent. Under these circumstances, there can be nothing "arbitrary or capricious" in the Commission's refusal to waive that rule.

^{6b/}
Neither Fine Music, Inc., nor Natick Broadcast Associates, Inc. v. F.C.C., No. 20,834, decided by this Court on November 7, 1967, require a contrary result. In both cases there was a question as to an operative fact (i.e., ground conductivity) which would be used as a yardstick to measure the effect of the proposal embodied in the application but which was not a function of the proposal itself. The amendments which were allowed in both cases were merely informative; they contained data by which the ground conductivity could be more accurately determined. In neither case did the amendment

change the radiation of the proposal -- as did appellant's amendment in the instant case -- so in neither case was there present the over-riding policy consideration which is present in the instant case and which relates to the basic purpose for which the present rule was adopted.

As noted above, this Court in the Ranger case, (supra), upheld the "cut-off" provisions of Sec. 1.227 as a valid and, indeed, necessary exercise of the Commission's authority. If the Court should reverse the Commission in the instant proceeding, it would necessarily destroy that rule. If the Commission can be required to consider an amendment filed after the 'cut-off date', that changes the radiation of a pending proposal, it will be put back to the same position it was in before the adoption of the present rule and will again face the quandry -- described in the Commission's own language at page 14 , supra, that the rule was designed to cure.

* * *

III

THE RULE OF THE ASHBACKER CASE DOES NOT INVALIDATE THE
PERTINENT RULES OR THE ACTION TAKEN UNDER THEM

There is nothing in the Ashbacker ^{7/} doctrine which requires a hearing under Section 309 ^{8/} on every application. This Court has recognized that Ashbacker allowed the Commission to adopt reasonable procedural regulations even though they might limit the hearing rights that applicants might otherwise enjoy. Century Broadcasting Corp. v. F.C.C. (supra).

It would completely pervert the spirit of Ashbacker to enlarge the rule of that case to require the Commission to hold hearings on an application that patently could not be granted. The Supreme Court has since shown that it would not do so. In the Storer case (supra), decided some 11 years after Ashbacker, that Court specifically held that Section 309 does not require a hearing in every situation:

"We read the Act and Regulations as providing a 'full hearing', for applicants who have reached the existing limit of stations, upon their presentation of an application conforming to Rules 1.361(c) and 1.702, that sets out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by Section 309(b), supra, would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open." 351 U.S. at p. 205; 76 S.Ct. at p. 771 (emphasis supplied).

Appellant, at page 14 of its brief, complains that its request for waiver of the "cut off" rule was denied without a hearing;

^{7/} Ashbacker Radio Corporation v. F.C.C., 326 U.S. 327; 66 S.Ct. 148 (1945)

^{8/} Communications Act of 1934, as amended, Sec. 309; 47 USC 309

and cites Storer as authority for the proposition that "the rejection of the request for waiver" was improper. Obviously, Storer does not require that every request for waiver be granted or even that a hearing be held on such a request. As is demonstrated in the language set out above, the sole requirement of Storer is that there be a mechanism by which waiver requests can be entertained and adjudicated. Appellant's request for waiver was entertained: the Commission considered and denied that request. As set out in II, above, the denial is supported by existing rules and regulatory policies. Appellant has had an ample measure of procedural due process; and, under these circumstances, Ashbacker requires no more.

IV

OTHER ARGUMENTS OF APPELLANT ARE NOT RELEVANT
AND RAISE NO COGNIZABLE LEGAL QUESTION

As indicated in the Counterstatement of the case (supra) appellant complains that, in allowing this intervenor subsequently to amend its application to reflect the death of Charles E. Springer, the Commission afforded it more lenient treatment than was extended to appellant. However, even if the amendment be considered as substituting Mrs. Springer for her husband's 50% interest, such a change comes specifically within the purview of Section 1.571(j)(2) of the Commission's rules, which provides that applications can be processed under their originally assigned file numbers so long as any original owner or owners retain a 50% interest in the amended application^{9/}

Moreover, Mr. Springer was alive on the "cut-off date"; and intervenor's application as then on file correctly reflected the ownership interest in the application. Unlike the amendment which appellant sought to have the Commission consider, the amendment to intervenor's application was not necessary to complete or correct its application to prevent its rejection on the "cut-off date" by operation of Section 1.566 or 1.564 of the Commission's rules.

* * *

Appellant's argument that the Commission's action herein should be revised because it deprives the Commission of a possible "Section 307(b) choice" between communities is equally without merit. If the Commission were to allow these considerations to

^{9/} See Appendix, p. I, infra.

control the application of its processing rule, the result would be utter chaos. If the rules are to have any effect they must obviously be applied "across the board", impartially to all applications. Moreover, as noted by the Commission in the Memorandum Opinion and Order here appealed from:

"Even if the operation of 307(b) were our sole consideration we note that Norfolk itself [for which appellant had applied] has four standard broadcast stations and the Norfolk-Portsmouth S.M.S.A. has seven."¹⁰/

Obviously, considerations relating to the malpractice liability and public embarrassment of consulting engineers involved in situations such as this raise no justifiable issue in this appeal and no policy question with which this Court need be concerned. The "cut-off" rules exist not for the purpose of "punishing errant engineers" (appellant's brief, p. 16) but to provide a system whereby the Commission staff can efficiently process applications. As indicated above, any encroachment on the restrictions contained in those rules will, pro tanto, affect the ability of the staff to process those applications which do conform to the filing regulations.

CONCLUSION

Each of appellant's arguments represents an unsuccessful attempt to establish that it was denied procedural due process when the Commission refused to consolidate its application with that of this intervenor and the other mutually exclusive applicant for the requested facility in eastern Virginia. We respectfully

¹⁰/ Record, p. 351.

submit that appellant did receive all of the procedural due process and consideration to which it was entitled and that to afford it the relief it has requested would so disrupt the Commission procedures that other applicants would be denied procedural due process in the future.

Respectfully submitted,

SUFFOLK BROADCASTERS

November 16, 1967

By

William P. Bernton
Its Attorney

621 Colorado Building
Washington, D. C. 20005

APPENDIX

RULES OF THE FEDERAL COMMUNICATIONS COMMISSION

Sec. 1.564 - Acceptance of Applications

(a) Applications which are tendered for filing in Washington, D. C., are dated upon receipt and then forwarded to the Broadcast Bureau, where an administrative examination is made to ascertain whether the applications are complete. Applications found to be complete or substantially complete are accepted for filing and are given a file number. In case of minor defects as to completeness, the applicant will be required to supply the missing information. Applications which are not substantially complete will be returned to the applicant.

(b) Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the Commission's administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the Commission's rules.

Sec. 1.571 (j) (2) - A new file number will be assigned to an application for a new station when it is amended to specify a change in ownership as a result of which one or more parties with an ownership interest in the original application do not have, on a collective basis, a 50 percent or more ownership interest in the amended application.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,180

JAMES RIVER BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

SUFFOLK BROADCASTERS,
Intervenor.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 16 1967

Nathan J. Paulson
CLERK

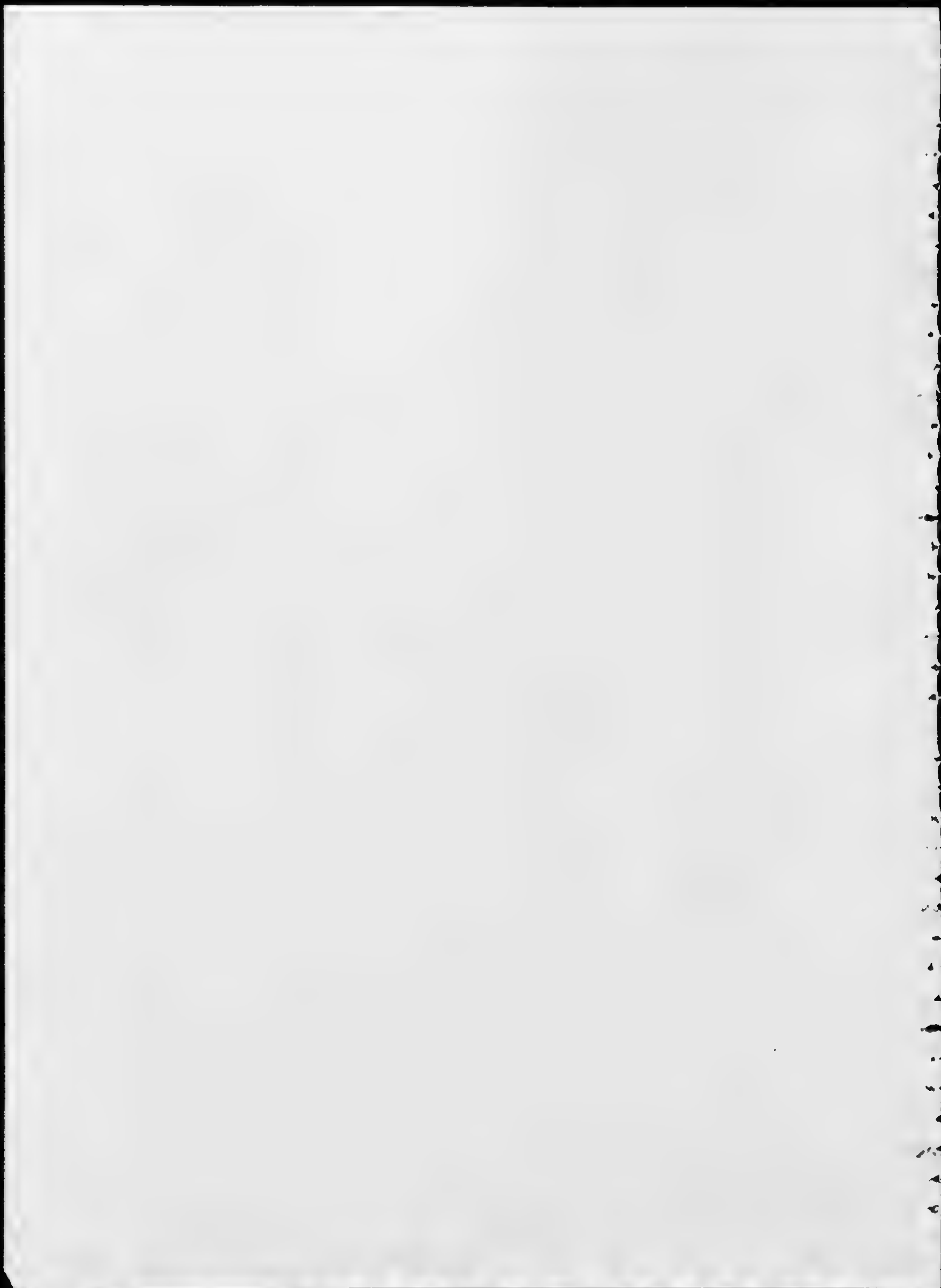
HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel,

WILLIAM L. FISHMAN,
Counsel.

Federal Communications Commission
Washington, D. C. 20554



STATEMENT OF QUESTIONS PRESENTED

The questions presented are correctly set forth on the first page of appellant's brief.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF QUESTIONS PRESENTED	(i)
COUNTERSTATEMENT	1
SUMMARY OF ARGUMENT	6
ARGUMENT	
PRELIMINARY STATEMENT	8
I. DISMISSAL OF THE JAMES RIVER APPLICATION WAS WELL WITHIN THE COMMISSION'S DISCRETION.	11
II. APPELLANT HAD NO RIGHT TO A HEARING.	21
III. THE COMMISSION'S ACTION WAS ENTIRELY CONSISTENT WITH ITS OWN RULES.	24
IV. DISMISSAL OF THE JAMES RIVER APPLICATION WAS ENTIRELY CONSISTENT WITH DISPOSITION OF SIMILAR APPLICATIONS.	26
CONCLUSION	28
APPENDIX A	A-1

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Ashbacker Radio Corp. v. Federal Communications Commission</u> , 326 U.S. 327 (1945).	4,7,21,22,23
<u>Bendix Aviation Corp. v. Federal Communications Commission</u> , 106 U.S. App. D.C. 304, 272 F.2d 553, cert. denied sub nom. <u>Aeronautical Radio, Inc. v. United States</u> , 361 U.S. 959 (1959).	21
<u>Guinan v. Federal Communications Commission</u> , 111 U.S. App. D.C. 371, 297 F.2d 782 (1961).	24
<u>KXA, Inc. v. Federal Communications Commission</u> , D.C. Cir. Case No. 20,527, decided June 30, 1967.	23
<u>Louisville Gas and Electric Co. v. Coleman</u> , 277 U.S. 32 (1928).	18
<u>Natick Broadcast Associates, Inc. v. Federal Communications Commission</u> , D.C. Cir., Case No. 20,834, decided November 7, 1967.	22
<u>Pittsburgh Radio Supply House v. Federal Communications Commission</u> , 69 App. D.C. 22, 98 F.2d 303 (1938).	21
<u>Ranger v. Federal Communications Commission</u> , 111 U.S. App. D.C. 44, 294 F.2d 240 (1961).	6,10,11,13,20,22,2
<u>The City of San Antonio v. Civil Aeronautics Board</u> , Case No. 20,383, decided February 17, 1967.	18
<u>United States v. Storer Broadcasting Co.</u> , 351 U.S. 192 (1956).	7,21,22,28
<u>Valley Broadcasting Co., Inc. v. Federal Communications Commission</u> , 99 U.S. App. D.C. 156, 237 F.2d 784 (1956).	18
 <u>Administrative Decisions:</u>	
<u>Cape Cod Broadcasting Corp.</u> , 7 Pike and Fischer, R.R. 2d 509 (1966).	25,26
<u>Fine Music, Inc.</u> , 6 F.C.C. 2d 186 (1966).	26,27
<u>Johnston Broadcasting Co.</u> , 5 Pike and Fischer, R.R. 1320 (1950).	26,27

Administrative Decisions:

Page

KXA. Inc., 8 Pike and Fischer, R.R. 2d 723 (1966).

23

Muskingum Broadcasting Co., 19 Pike and Fischer,
R.R. 552 (1959).

28

Statutes:

Communications Act of 1934, as amended, 48 Stat. 1064,
47 U.S.C. 151 et seq.

Section 307(b)

5,7,14,15,23

Section 309

7,18,22,23

Section 402(b)

1

Rules and Regulations of the Federal Communications
Commission, 47 CFR (1966):

Section 1.227(b)

2,5,8,12,21

Section 1.522

17

Section 1.564(a)

8

Section 1.566(a)

8,10,20

Section 1.571(c)

2,8,21

Section 1.571(j)

17

Section 1.591(b)

2

Section 73.37

24,25,26

Section 73.187

3,11,14,21,24,25,26

Other Authorities:

AM Processing Procedure, 18 Pike and Fischer, R.R. 1565
(1959).

10

Public Law 86-752, 74 Stat. 889 (1960).

18

Report and Order in Docket No. 8333, 27 F.C.C. 597,
modified 27 F.C.C. 690, recon. den., 27 F.C.C. 825
(1959).

24

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,180

JAMES RIVER BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

SUFFOLK BROADCASTERS,
Intervenor.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This appeal, filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. section 402(b), arises from a Commission letter of November 2, 1966, dismissing as unacceptable for filing appellant's application for a new standard broadcast station to be constructed at Norfolk, Virginia, and from a Memorandum Opinion and Order of July 31, 1967, denying reconsideration of the earlier action.

Since appellant's statement of the case is argumentative and incomplete, we believe this counterstatement will assist the Court.

On May 27, 1966, James River Broadcasting Corporation (hereafter James River or appellant) tendered for filing with the Commission an application for a new radio station to operate on 1110 kilocycles in Norfolk, Virginia (R. 148-241). Because of mutually destructive electrical interference, this application was mutually exclusive with the application of Virginia Broadcasters for a new station to be constructed on 1110 kilocycles at Williamsburg Virginia (R. 1-53, 61-84), and with a third application on the same frequency at Suffolk, Virginia (R. 96-146). The Virginia Broadcasters application had been filed in July, 1965, and, pursuant to sections 1.227(b)(1) and (4), 1.571(c), and 1.591(b) of the Commission's rules,^{1/} the Commission released a Public Notice on April 22, 1966 (31 F.R. 6460), setting May 31, 1966, as the cut-off date by which any application mutually exclusive with the Virginia Broadcasters application had to be filed in order to receive comparative consideration. Appellant's May 27 application was thus filed within the period allowed by the rules.

On August 16, 1966, the licensee of station KFAB, the dominant class I-B channel on 1110 kilocycles in Omaha, Nebraska, filed a petition to reject the James River application (R. 242-245), pointing out that the proposed facility failed to provide adequate protection to KFAB from "daytime skywave" interference as required

^{1/} The pertinent portions of the Commission's rules are attached hereto as Attachment A.

by section 73.187 of the rules, 47 CFR section 73.187. This section provides that dominant class I-B stations, like KFAB, are entitled to daytime protection from skywave interference up to their 0.1 mv/m contours. That is, co-channel stations such as proposed by each of the applications for 1110 kilocycles, must restrict their radiation toward the dominant stations to below a certain level during particular portions of the broadcast day. The appellant's engineering showing indicated on its face that the proposed radiation would exceed these levels toward KFAB; the requirement was simply not dealt with by the engineer. However, on August 19, 1966, appellant filed an amendment to its application (R. 246-274), which acknowledged the error in the original filing and reduced the proposed radiation toward KFAB to a level in conformance with the provisions of section 73.187.^{2/}

By letter of November 2, 1966 (R. 283), the Commission returned the James River application on the ground that, as tendered on May 27, 1966, it was in violation of the Commission's engineering rules and was therefore not acceptable for filing by the May 31, 1966, cut-off date. The letter held that the August 19, 1966 amendment rendered the application acceptable for filing only on that date, too late to meet the cut-off date of May 31, 1966,

^{2/} In a reply to James River's opposition to its Petition to Reject Application, KFAB took the position, supported by engineering data, that the amendment failed to remove the interference problems (R. 277-281).

assigned to all applications in conflict with the Virginia Broadcasters application. Following a timely filed petition for reconsideration (R. 285-308), the Commission, in a Memorandum Opinion and Order released on July 31, 1967 (R. 350-355), again declined to accept the James River application.

The Commission indicated that the original defect was a serious one and that the application originally tendered was therefore not substantially complete:

James River's argument that its application was substantially complete and lacking only in some minor respects is not well founded and cases cited in support of this contention are not pertinent. They involve defects such as failure to submit copies of corporate by-laws and articles of incorporation; failure to submit adequate balance sheets; failure to comply with state security laws; failure to give exact street address of studio; and minor variations in transmitter site coordinates. The Commission has always permitted applicants to correct these types of deficiencies after acceptance and even by amendment after designation for hearing. In none of the cases cited was a question of protection of an existing station involved. On the other hand, James River violated an important technical standard which specifically bars all proposals that do not provide adequate daytime skywave protection for Class I stations. (R. 351)

The Commission also dealt with and rejected the argument that dismissal of the James River application deprived the applicant of its right to a hearing under the doctrine of Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (1945), and similarly rejected the contention that dismissal would deprive the Commission of the opportunity of making a choice, pursuant

to section 307(b) of the Act, 47 U.S.C. section 307(b), between the various cities here involved. The Commission found, in sum, that the proposal, as filed, was patently not in accordance with the rules, and stated:

Although the amendment tendered August 19, 1966 corrected the engineering defect, it did not do so until after the [Virginia Broadcasters] application cut-off date. As a result, the application was not entitled to consolidation under section 1.227(b) of the Rules. (R. 352)

The Commission also observed that the decision to file the James River application only four days before the cut-off date was solely that of the applicant, and that the difficulty into which it fell because of the gross omission in its engineering showing could be laid exclusively to its own errors. Simultaneously, the Commission designated the two remaining mutually exclusive applications for hearing. This appeal followed and on September 26, 1967, a stay pendente lite was granted.

SUMMARY OF ARGUMENT

The Commission's action dismissing appellant's application was entirely reasonable and serves the public interest. The Commission's "cut-off" rules, approved by this Court in Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240 (1961), are designed to foster rapid and efficient disposition of AM applications filed with the Commission, and appellant's application was dismissed because it squarely violated that rule. Although James River had filed an application prior to the cut-off date, that application was substantively defective and therefore unacceptable for filing when the cut-off date arrived. The subsequent attempt to file a corrective amendment was in clear violation of the cut-off rule. Since appellant waited for the 11th hour to file its application, it cannot now complain that it had inadequate time to properly prepare the original application or to remedy errors therein. Appellant was on notice that defective applications would not be acceptable and that curative amendments, filed after the cut-off date, would not be accepted.

Permitting applicants to modify their proposals after the cut-off date has passed specifically to render their applications acceptable for filing would largely vitiate the effectiveness of the cut-off procedure, and would return AM processing to the awkward, time-consuming and inequitable system whose unsatisfactory nature lead to the adoption of the present cut-off rule.

Appellant was not entitled to a hearing because its application, as originally tendered, was in square violation of an important substantive rule, and as amended, was violative of an important procedural requirement. Neither section 309 of the Communications Act, 47 U.S.C. 309, nor Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945), requires that an application be set for hearing when it is fundamentally defective. If the rejection at the threshold is proper, considerations of comparative merit need not be reached. In such a case, the application is not entitled to comparative consideration because it is entitled to no consideration at all. Appellant failed to show that waiver of any of the rules involved would serve the public interest. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). Similarly, there was no violation of section 307(b), 47 U.S.C. 307(b), in the Commission's refusal to set the James River application for comparative hearing with other, acceptable, applications for different communities.

The Commission's action was entirely consistent with its own rules and with prior decisions. The substantive allocations rule with which the original application failed to comply is an important technical standard which has never been waived. Nor have the cut-off rules ever been waived in a situation such as that presented here. The Commission has consistently refused to permit curative amendments after the cut-off date, and cases where amendments or changes have been accepted did not involve curative amendments filed after the cut-off date, which changed the proposal in a significant way.

ARGUMENT

Preliminary Statement

We will show below that each of appellant's contentions is without merit. As a preliminary matter, however, we submit for the Court's consideration, the following information concerning the Commission's application processing procedure as it relates to this case.

Section 1.564(a) of the Commission's Rules, 47 CFR section 1.564(a), requires that applications which are tendered for filing be dated upon receipt and then examined to ascertain whether they are complete. If they are at least substantially complete, they are accepted for filing. Minor defects as to completeness may be corrected thereafter. However, Section 1.566(a), 47 CFR section 1.566(a), provides, in pertinent part, that:

Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing

When an application is accepted for filing, it is given a file number. At regular intervals, a Public Notice is issued listing those applications which have been accepted. Pursuant to the processing procedure described in Sections 1.227(b)(1) and 1.571(c), 47 CFR sections 1.227(b)(1) and 1.571(c), applications are considered in numerical order according to their file numbers except that those which are mutually exclusive are considered together. To facilitate the consideration of all such conflicting

applications with reasonable dispatch, the Commission periodically publishes in the Federal Register a Public Notice listing those applications near the top of its processing line. This Public Notice establishes a date (at least 30 days after publication) known as the "cut-off date" by which time any mutually exclusive applications must be filed in order to be eligible for comparative consideration.

The cut-off rule was adopted in 1959 as a response to a mounting backlog of standard broadcast applications. Under the rules in effect prior to 1959, an application was entitled to consideration with a prior filed application if it was on file by the close of business on the day before the prior filed application was granted or designated for hearing. Also, as is still the case, applications could be freely amended as a matter of right at any time before designation for hearing. This system was administratively cumbersome since each time an application was processed and ready for action, new applications could be filed or amendments submitted and the whole process had to begin anew. In adopting the new rule the Commission noted the growing proportions of the processing difficulties, and stated:

The situation outlined above has seriously impaired the handling of applications for new or changed standard broadcast facilities, and has been very wasteful of the time of the Commission's staff. It is now clear that there can be no improvement in the status of the processing line unless applications may be processed to a conclusion without interruption and the necessity of reprocessing because of new filings and amendments to pending applications, including those in the processing stage.

AM Processing Procedure, 18 Pike & Fischer, R.R. 1565 at 1566.

Under the cut-off rule, an applicant is expected to submit an acceptable application on or before any cut-off date which applies to him. If he does not meet this requirement, he is not entitled to consideration with the already-accepted conflicting application. The theory is that applicants and potential applicants should have ample opportunity to carefully prepare and perfect their proposals consonant with the orderly and timely disposition of the Commission's business.

As indicated above, the cut-off date for the Virginia Broadcasters application was May 31, 1966, and the appellant's application was on file four days prior thereto, May 27, 1966. The Commission's study of this application, however, revealed a violation of an important technical standard which specifically bars all proposals that do not provide adequate daytime skywave protection for Class I stations. The Commission therefore dismissed the application because it was "patently not in accordance with the Commission's Rules" within the meaning of Section 1.566. Although the subsequent amendment cured the defect, it was not timely filed under the cut-off rules and was consequently unacceptable.

The cut-off procedure was specifically endorsed by this Court in Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240 (1961). In that case, the applicant had failed to submit an acceptable application by the applicable cut-

off date, and a later request for nunc pro tunc treatment had been denied. This Court affirmed, stating, 111 U.S. App. D.C. at 48, 294 F.2d at 244:

Appellants were on notice when they filed their application that the cut-off date for comparative consideration with a pending application was May 15th. Thus they were on notice that an application by them must be in such condition by that date as to entitle them to comparative hearing. When they failed to comply with the clear and valid rule they assumed the risks of that failure.

It is submitted that appellant is in no different position.

With this as background, we turn to the specific arguments advanced by James River.

I. DISMISSAL OF THE JAMES RIVER APPLICATION WAS WELL WITHIN THE COMMISSION'S DISCRETION.

Appellant argues (Br. pp. 7-8) that the engineering defect in its application was slight and was immediately cured (albeit after the cut-off date) when notice of such defect was supplied.^{3/} Although we maintain that the engineering omission was a substantial one, we do not rest our argument on that ground alone. In our view, the vice inherent here lies in the grave danger that acceptance of the amended James River application will lead to a permanent erosion of the Commission's carefully conceived processing system. This danger is a substantial one because were appellant's amendment accepted here, the cut-off rule would in effect be modified so that the cut-off date would be final unless it could be shown that an engineering amendment tendered after the cut-off date was necessitated by error, omission, or similar circumstance. The line

^{3/} As indicated above, supra, pp. 2-3, the application as filed failed to indicate that adequate "daytime skywave" protection was being provided to a cochannel station as required by 47 CFR section 73.187. That is, the radiation proposed by the application would have interfered with the service area of an existing station, contrary to the Commission's rules.

would thus be drawn in a different way, but we believe in a less satisfactory fashion from the overall point of view. Such a system would involve further study of the tendered amendment to determine whether it should be accepted and to determine whether it involves any new conflicts.^{4/} Because of the uncertainty as to any particular application, the net effect would be to delay disposition both of prior filed application -- applications which were correct and complete when filed, and which may have accumulated certain equities for speedy disposition, as well as to delay disposition of applications filed after that sought to be amended.

The main objective of the cut-off rule is to establish a definite time beyond which new applications cannot be accepted for filing, or applications already on file cannot be amended^{5/} so as to further extend an existing chain or group of conflicting proposals. This is the only method that the Commission has been able to devise which would enable it to dispose of the oldest or "lead" application,

^{4/} In the case of TV and FM applications the grouping of conflicting applications is a simple matter because the Commission's Rules provide for minimum channel separation based on maximum power and specify which channel is to be used in a certain city. In AM, on the other hand, there is no table of assigned frequencies, and what is more important, there is an infinite variety of directional patterns that can be designed with varying powers in such a way as to emit or suppress radiation in any given direction creating interlinking conflict between several groups of proposals for different communities over wide sections of the country. For that reason, applicants are required to tailor their proposals to protect existing operations and also avoid conflict with earlier filed cut-off applications which are afforded the same protection as existing stations. It is this very versatility of design which contributed to the logjam of applications which forced the Commission to abandon the rule (still used in FM and TV, i.e., 47 CFR 1.227(b)(1)(i), supra) that permitted an application to be filed or amended on the day preceding action on conflicting proposals.

^{5/} We emphasize that there is no essential difference from an engineering standpoint between a late filed amendment which causes additional conflict and a late filed application.

either by grant without hearing or by designation for hearing alone or with conflicting proposals. In the Ranger decision, at 111 U.S. App. D.C. 47, 294 F.2d 243, Judge Prettyman described the potentially infinite groupings which could develop if the filing of new applications were not in some manner curtailed. The same rationale applies to the facts of this case. If applicants were permitted to amend their proposals after the cut-off date, substantial delay would be caused, of uncertain duration in any particular case but tending in all instances to erode the principle ^{of dealing} with applications in manageable groups in the interests of fairness to those already on file.

Furthermore, the present system permits all potential applicants to rely on a definite date upon which the potential applicant may examine the proposals already on file, and determine therefrom when and for what facilities it should apply. This reliance factor would be largely undercut by a system in which the cut-off date would be a guide but not an absolute requirement.

The following hypothetical cases are set forth in an effort to illustrate how the present rule attempts to minimize processing difficulties. "A" (here Virginia), the lead application, was filed in July of 1965 and assigned a published cut-off date of May 31, 1966. "B" (here Suffolk) was filed on that date and was mutually exclusive with A. "C" (here James River) was also timely tendered four days prior to the lead application's cut-off date. Thus, at the close of business on May 31, 1966, any and all potential future applicants knew that (i) they may no longer file a proposal

which directly conflicts with A; (ii) they may not conflict indirectly with A, i.e., they may not interlink with A by conflicting with any acceptable proposals which have been timely filed and which, in turn, involve conflicts necessitating a hearing with A;^{6/} (iii) if B and C are acceptable for filing, the ABC group will be processed and ultimately designated for hearing;^{7/} (iv) none of the potential ABC group can amend in such a fashion as to create a larger group.

In the present case, a potential applicant (P) also knew from looking at C's application that it was not acceptable for filing on the cut-off date because C had failed to protect the dominant I-B station, KFAB, as required by 47 CFR 73.187. With this knowledge, P could predict that C's proposal would be rejected by the Commission and that he (P), in designing his own proposal, need only protect the proposed service areas (0.5 mv/m contour) of A and B. Thus, C's proposed service area, covering hundreds of square miles was open to invasion by any potential applicant who could tailor his proposal to serve that area while protecting A and B. Now let us suppose that P is also considering another group of applicants, D, E, and F for nearby towns. We will assume that the cut-off date for the lead applicant, D, is 20 days after A's, i.e. June 20, 1966. We also assume P knows that because of the frequencies available and the proximity of the towns that P, D, E, and F will be mutually exclusive and a comparative hearing must be held to determine, under Section 307(b) of the Act, which of the proposals would represent

^{6/} Public Notice of April 22, 1966, 31 F. R. 6460 at 6461.

^{7/} Unless one or more of them drops out or amends so as to break the chain of conflict.

the best allocation of radio service. If P thought that C was acceptable for filing, he would be forced to protect C's proposed service area because C's May 31st effective cut-off date had run. In order to avoid conflict with C, P would perhaps limit his proposed power to 500 watts. In so doing, however, P would be limiting the area and number of people he proposed to serve. On the other hand, knowing C would be rejected by the Commission, P would not be required to protect C and could increase his proposed radiation in the direction of C's unprotected service area. In this way P would increase his coverage, and this factor alone might well be decisive in his 307(b) showing vis a vis D, E, and F. Likewise D, E, or F might also amend their proposals based on the knowledge that C would be dismissed.

The key factor in the above illustration is the element of predictability; without it the rule is a total failure. If P cannot predict with certainty the rejection of C, he cannot rationally design his proposal. If he assumes the Commission will permit C to cure its defective application, he must protect C and restrict radiation in C's direction, thereby running the risk of impairing the comparative merits of his own proposal. Under another circumstance, the so-called "chain reaction" effect would occur. Thus, P assumes that C will be rejected. He then designs his proposal for maximum coverage and "interferes" with C's proposal. The Commission then determines it will accept C's application nunc pro tunc the original tender date (May 27, 1966) after C amended on August 19, 1966, to

remove its defect. P had designed its proposal and filed on the reasonable assumption that the Commission would enforce its own rules. Because of this reliance, and in all fairness, the Commission could not then reject P's proposal because it conflicted with C and was not timely filed by the lead cut-off date of A. To do so would be manifestly unfair because if P knew the Commission was going to accept C, he would have avoided the conflict. So the Commission would have to accept P also. Thus, A, B, C, P, D, E, and F would be in conflict notwithstanding the fact that P was not timely filed with A and, in fact, had no intention of conflicting with the A, B group. Finally, if P is required to wait until the Commission announces its ruling on the question of C's acceptability, D's cut-off date will have run ^{8/} and P will not be able to join the D, E, F group. As between two innocent parties, C and P, it is more equitable to fulfill P's justifiable reliance interest. We emphasize that the above discussion is merely illustrative of the problems which would arise if the rule were not strictly enforced.

Of course, from the point of view of James River it would be most desirable to permit it to amend its engineering if it wishes to do so for any reason, and an improved engineering proposal might

^{8/} The Commission's final ruling on the question of James River's acceptance was not released until 14 months after the tender of the application.

better serve the public interest.^{9/} What must be borne in mind, however, is that C cannot be considered in isolation.^{10/} Other meritorious applications may be affected by the filing of C, as well as by the amendment of C. The equities of each application as well as the public interest in the fullest consideration of each application consonant with reasonable administrative dispatch must be harmonized, and the cut-off rule attempts to do this by striking a certain balance. Permitting engineering amendments to render acceptable otherwise unacceptable applications would in large measure be a return to the previous unworkable system, under which the Commission examined applications and advised of deficiencies giving applicants an opportunity to cure the errors at any time prior to grant or designation for hearing of conflicting applications. An application could be retendered and found deficient an infinite number of times.

This type of piecemeal processing fostered so many poorly prepared applications, placed such a heavy burden on the Commission, and caused such serious delays in disposing of senior applicants that

^{9/} It should be noted that under 47 CFR 1.571 (j) (1), many kinds of engineering amendments can be filed after the cut-off date. What is not permitted, inter alia, is an engineering amendment whose purpose is to render acceptable a previously unacceptable application. Acceptable applications, of course, have always been permitted to amend so long as no new conflicts were created or the amendment did not change the basic nature of the proposal. 47 CFR 1.522, 1.571(j) (1). Thus, P's equities are adversely affected as in the illustration supra.

^{10/} There are 4,200 AM stations allocated on 107 channels and three to four hundred applications pending at all times for new stations or major changes in existing ones.

the "McFarland letter" requirement of Section 309(b) was removed from the Act. ^{11/}

Drawing a line at the cut-off date will naturally lead to seemingly harsh results as to certain applicants, but the basic soundness of the rule is manifest and the occasional difficult case does not demonstrate the contrary. In an analogous context, this Court recently cited with approval the following language of Mr. Justice Holmes, dissenting, in Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 41 (1928):

* * * Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [agency] must be accepted unless we can say that it is very wide of any reasonable mark. The City of San Antonio v. Civil Aeronautics Board, ___ F.2d ___ (D.C. Cir., 1967).

The Commission is aware that engineers will continue to err inadvertently, and whenever this occurs in a context like that illustrated in this case, the result is unfortunate for the applicant. But the purpose of having a cut-off rule is not to punish erring engineers; it is to protect other applicants and prospective applicants who may be injured if the error is correctable subsequent to the cut-off date. Waivers may, of course, be granted in truly extraordinary circumstances. But this is not such a case. Valley Broadcasting Co., Inc. v. Federal Communications Commission, 99 U.S. App. D.C. 156, 237 F.2d 784 (1956), relied upon by appellant, ^{11/} P.L. 86-752, 74 Stat. 889 (1960).

is a patently distinguishable case. There, the Court described the rigid adherence to closing time as undue "zeal for orderly procedures." Here, however, there is an overall policy determination which is being threatened. We submit that the result reached by the Commission is entirely reasonable, and is in fact required in the public interest.

However, appellant further argues (Br. pp. 7-9, 15-17) that the cut-off rules as applied to it are unnecessary, and unduly harsh because human errors are always bound to occur. The argument is clearly misplaced. In rejecting appellant's request for reconsideration, the Commission noted:

If James River had not decided to delay its filing until shortly before Virginia Broadcasters' cut-off date, perhaps the defect could have been remedied in time. But, the plight of which it complains is of its own making; and public interest considerations can hardly be said to weigh in favor of the procedural disarray that would result from its acceptance. (R. 352)

Had appellant filed earlier, it would have had ample opportunity to make whatever corrections were necessary upon the rejection of its application as filed. While appellant argues that the publication of the May 31, 1966 date on April 22, 1966 left it little time to prepare an application, it overlooks the obvious fact that April 22, 1966 was not the first date on which it might have applied for the facilities requested. The frequency has long been available. Nothing in the rules barred James River from filing at any time; the Virginia Broadcasters application was filed on July 21, 1965, and James River might even have filed prior thereto. The cut-off and minimum technical criteria rules, by putting a

premium on accuracy and completeness penalize only those applicants who delay filing until the eleventh hour. If there is then not sufficient time to remedy the inadequate application, the fault is that of the applicant only.

We think an applicant for a radio license who either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing. (Ranger v. Federal Communications Commission, supra, 111 U.S. App. D.C. at 46, 294 F.2d at 242.)

The appellant's lack of equity is underscored by the fact that the engineering aspects of its proposal were prepared by a principal to the application, not an independent contractor. The Commission in its "instructions" to FCC Form 301 (the basic application form) advises applicants to familiarize themselves with, among other things, the relevant portions of the Commission's rules and Standards of Good Engineering Practice and warns applicants in bold type that "defective or incomplete applications may be returned without consideration."^{12/}

^{12/} Section 1.566(a) specifically provides that applications patently not in accord with the rules will be considered defective and will not be accepted for filing.

II. APPELLANT HAD NO RIGHT TO A HEARING.

Appellant argues (Br. pp. 10-11) that the summary rejection of applications which clearly violate the AM assignment standards and the Commission's processing rules constitutes a denial of an applicant's right to a hearing under 47 U.S.C. section 309, as well as under the doctrine enunciated in Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945). Insofar as appellant attacks as violating Ashbacker the summary rejection of applications which on their face violate regulations establishing minimum technical criteria for acceptability, its argument is contrary to a long line of cases holding that such applications may be rejected at the threshold. See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Bendix Aviation Corp. v. Federal Communications Commission, 106 U.S. App. D.C. 304, 272 F.2d 553, cert. denied sub nom. Aeronautical Radio, Inc. v. United States, 361 U.S. 959 (1959); Pittsburgh Radio Supply House v. Federal Communications Commission, 69 App. D.C. 22, 98 F.2d 303 (1938).

In the Ashbacker decision, the Supreme Court noted (326 U.S. at 333 n.9) that the Commission had not at that time promulgated a regulation which, in the interest of orderly administration, required an application for a frequency previously applied for to be filed by a certain date. Sections 1.571 and 1.227 now so provide and, as we have indicated above, this Court specifically approved

such a procedure in the Ranger case. In Ashbacker, the question before the Court was "whether an applicant for a construction permit . . . is granted the hearing to which he is entitled by [§309(e)] of the Act, where the Commission, having before it two applications which are mutually exclusive, grants one without a hearing and sets the other for hearing," Id., 327-328 (emphasis added). The Court held that since a grant of the former precludes a grant of the latter, the hearing "becomes an empty thing," thus violating the statute. But here appellant, unlike Ashbacker, has no statutory right to a hearing. Its application, as originally filed conflicted with substantive rules and policies,^{13/} and as amended, conflicted with basic processing requirements. In such a case, section 309 has been construed to require a hearing only if "the accompanying papers . . . set forth reasons, sufficient if true, to justify a change or waiver of the Rules." United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). Since

^{13/} This Court recently remanded the Natick Broadcast Associates application (Case No. 20,834, decided November 7, 1967) to the Commission for comparative hearing with an application whose cut-off date had passed, stating that the Commission had there been "hypertechnical" in refusing to accept a retendered application which, by means of measurement data, endeavored to support the original application's theoretical showing that there would be no prohibited overlap. The Court qualified its opinion by stating that, "if in fact Natick's proposed station is shown objectionably to violate the overlap rule, of course the application should be rejected." Here, there is no dispute but that the James River application as filed violated the protection requirements of Section 73.187 of the Commission's Rules. The proffered amendment did not, as was argued in Natick, seek to reinforce but rather sought to make a new and changed showing. Thus, this case is clearly distinguishable on its facts from Natick.

appellant did not make this requisite showing, its application was properly rejected. It was not entitled to comparative consideration with the other proposals because it was not entitled to further consideration at all. In Ranger v. Federal Communications Commission, supra, this Court specifically noted that the hearing required by section 309(e) of the Act was not necessary where the application on its face was lacking in material respects. 111 U.S. App. D.C. at 46, 294 F.2d at 242.

And this Court has recently rejected an argument strikingly similar to that of appellant. IN KXA, Inc. v. Federal Communications Commission, affirmed without opinion on June 30, 1967 (Case No. 20,527), appellant argued that the Commission's rejection of its application for a channel no longer available for new AM facilities such as appellant proposed violated its rights to a hearing under both Section 309 of the Act, and the Ashbacker case. The Commission held, however, that the Ashbacker doctrine is not applicable to proposals which are in violation of the rules. KXA, Inc., 8 Pike & Fischer, R.R. 2d 723, 725 (1966).

Appellant also claims (Br. pp. 13-14) that the Commission's action here violated section 307(b) of the Act, 47 U.S.C. section 307(b), which mandates the Commission to provide for the "fair, efficient, and equitable" distribution of radio service. But, as we have indicated above, the James River application was fundamentally defective; substantively as originally filed, and procedurally as amended. Consequently, for the same reasons that its rejection does not violate the Ashbacker doctrine, it does not violate section 307(b)

of the Act. Thus, in Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 374, 297 F.2d 782, 785 (1961), this Court observed that there need not be "a comparative treatment of respective community needs in a situation where two applicants are competing for a mutually exclusive permit once it has been established that one of the competing applicants is ^{14/}bacially unqualified."

III. THE COMMISSION'S ACTION WAS ENTIRELY
CONSISTENT WITH ITS OWN RULES.

Appellant argues (Br. pp. 7-9) that the return of its application based on its failure to comply with section 73.187, 47 CFR section 73.187, the daytime skywave rule, was erroneous because that rule does not provide that applications violating its provisions will be automatically returned as unacceptable. In contrast, appellant points to section 73.37, 47 CFR section 73.37, which bars applications on a "go no go" basis which show prohibited overlap with existing facilities, and which provides that such applications must be returned as unacceptable.

Section 73.187 was adopted by the Commission in 1959 at the conclusion of an extensive rule making proceeding which had considered exhaustively the problem of daytime skywave interference. Report and Order in Docket No. 8333, 27 F.C.C. 597, modified 27 F.C.C. 690, reconsideration denied 27 F.C.C. 825 (1959). The rule

^{14/} Appellant argues (Br. pp. 14-15) that of the three applications filed on 1110 kilocycles, appellant's would serve the greatest need. The argument is plainly pure conjecture and is not based on any findings in this record. Commission records show, however, that the Norfolk, Virginia area, site of appellant's proposed station, is served by 18 aural broadcast services.

embodies the Commission's determination that dominant class I stations on certain channels which render service over wide areas of the country, are to be protected to their 0.1 mv/m groundwave contour. That is, new allocations, by the terms of the rule, must be designed to restrict their radiation towards the class I stations on their channels to a certain level in order to avoid interfering, through daytime skywave radiation, with the signal of the class I station. Thus, while section 73.187 is concerned with a different kind of electrical interference than is section 73.37 (skywave, as opposed to groundwave), it is identical to it in the sense that both rules seek to establish rigid standards concerning electrical interference to existing stations to which new proposals must conform, and both seek to make unnecessary a case by case evaluation of the degree of interference. Like 73.37, section 73.187 is absolute in its operation and is basic to the present AM allocation scheme. We are not aware of any instance in which section 73.187 has been waived. See Cape Cod Broadcasting Corp., 7 Pike & Fischer, R.R. 2d 509, 512 (1966).

Consequently, although section 73.37, adopted after section 73.187, and in a different proceeding, requires in specific terms that applications violating its provisions are not only not to be granted, but in addition, are to be automatically returned, the net effect of the specific bar to the grant of an application violating section 73.187 is exactly the same. In practice, the two rules have been consistently interpreted to require automatic return

of applications violating these rules. Many proposals in violation of 73.187 have been so treated.

IV. DISMISSAL OF THE JAMES RIVER APPLICATION
WAS ENTIRELY CONSISTENT WITH DISPOSITION
OF SIMILAR APPLICATIONS.

Appellant argues (Br. pp. 13-14) that other applications presenting similar problems have been treated more leniently. There is no substance to this claim. Appellant has not cited a single case in which an application was accepted which violated the requirements of section 73.187, and the Commission's practice has been consistently to reject such applications, as well as those violating the "go no go" provisions of section 73.37. Cape Cod Broadcasting Corp., supra.

Cases cited by appellant in support of its argument are readily distinguishable.^{15/}

For example, in Johnston Broadcasting Co., 5 Pike & Fischer, R.R. 1320 (1950), the Commission permitted a nunc pro tunc amendment of an application in order to correct a defective verification. The Commission explained, 5 Pike & Fischer, R.R. at 1324:

The proposed amendment . . . would appear to be clearly corrective in nature, since the substance of the engineering report, which the defective verification failed to cover, has never been in issue and the amendment at this time would create no factual issue for further determination by the Commission. There is no contention that Beach [the appli-

^{15/} We note that of the cases cited by appellant only one, Fine Music, Inc., infra, involved the cut-off rule in its present form.

cant] has not acted in good faith at all times, nor has it been alleged that the engineering report in question was false or erroneous in any respect. (Emphasis added.)

The difference between the above situation and the case at bar is obvious. The application in Johnston was defective only in form when filed, whereas appellant's application contained a defect of substance which rendered it unacceptable for filing.^{16/}

Fine Music, Inc., 6 F.C.C. 2d 186 (1966) is totally inapplicable for two reasons. First, A, whose application was in conflict with B, tendered its application on B's cut-off date. But B's proposal conflicted with C, as a result of which A would normally be governed by C's cut-off date which was earlier than B's and which would have resulted in A's application being late filed. A endeavored unsuccessfully by means of field intensity measurements to show that there was actually no engineering conflict between B and C. The Commission, however, did not accept A's showing and returned A's application as untimely filed. A later retendered its application with acceptable measurement data and the Commission accepted A's application nunc pro tunc as of B's cut-off date. The difference between Fine Music and this case is that A never changed its application. A was merely trying to show that the wrong cut-off date had been applied to it.

^{16/} Similarly, the failure of Virginia Broadcasters to supply the correct number of antenna site photographs is patently a trivial omission, unlike that in appellant's application.

This is far different than submitting a late, substitute showing in order to eliminate a substantive defect in an application. The second, and equally vital difference between these two cases is that the Commission's nunc pro tunc acceptance of A's application was based not only upon the above facts but also on the fact that B had amended its application to remove any possibility of a conflict between B and C. In fact, a reading of the dispositive paragraph of the Commission's opinion leads to the conclusion that it was B's amendment which actually decided the issue of A's nunc pro tunc acceptance.

Other cases cited by appellant are either clearly inapposite or readily distinguishable.^{17/} Nor was appellant entitled to a hearing on its waiver request. Appellant failed to show the existence of any facts or circumstance which would justify waiver of the cut-off rule. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

CONCLUSION

In sum, appellant filed an application with the Commission only four days before the cut-off date. The application was inadequate in that it totally failed to deal with a basic engineering

^{17/} E.g., Muskingum Broadcasting Co., 19 Pike & Fischer, R.R. 552 (1959). There the Commission noted that return of the application was improper because as originally filed it was adequate; the defective material was surplusage and should not have tainted the entire application.

requirement. The Commission has given fair notice that such applications will be returned summarily because of the necessity to process efficiently the vast numbers of application which are filed with the Commission. Had appellant filed its application earlier, as it was free to do, the returned application might have been corrected and resubmitted. Thus, the difficulty in which appellant finds itself is entirely of its own doing, and the Commission acted well within its discretion in concluding that the James River application could not be accepted.

For the foregoing reasons, the Commission's orders here appealed from should be affirmed.

Respectfully submitted,

HENRY GELLER,
General Counsel,

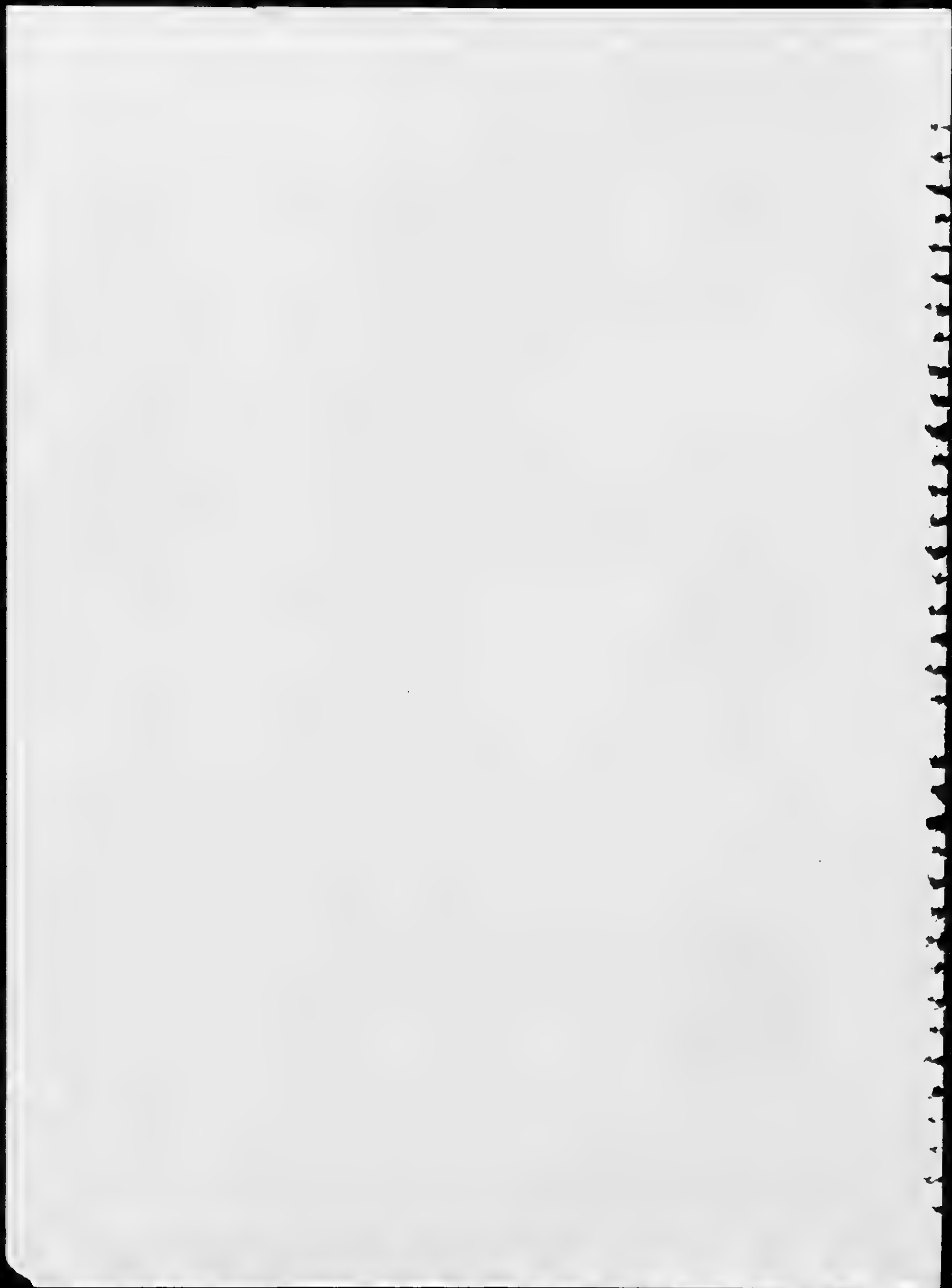
JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel,

WILLIAM L. FISHMAN,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

November 16, 1967



ATTACHMENT A

Rules and Regulations of the Federal Communications Commission:

47 CFR §1.227(b)(1) and (4):

(b)(1) In broadcast cases, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended if amended so as to require a new file number, is substantially complete and tendered for filing by whichever date is earlier:

(i) The close of business on the day preceding the day the previously filed application or one of the previously filed applications is designated for hearing; or (ii) the close of business on the day preceding the day designated by public notice published in the Federal Register as the day any one of the previously filed applications is available and ready for processing.

(4) Any mutually exclusive application filed after the date prescribed in subparagraphs (1), (2), or (3) of this paragraph will be dismissed without prejudice and will be eligible for refiling only after a final decision is rendered by the Commission with respect to the prior application or applications or after such application or applications are dismissed or removed from the hearing docket.

47 CFR 1.571(c):

(c) Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without

designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed applications is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) of this paragraph must be filed if they are to be grouped with any of the listed applications.

47 CFR 1.566(a):

Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.

47 CFR 1.591(b):

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the Commission will not consider any other application, or any other application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete and tendered for filing by whichever date is earlier: (1) The close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration; or (2) the close of business on the day preceding the day designated by public notice in the Federal Register as the day the application under consideration is available and ready for processing.

47 CFR 73.187(a):

(a)(1) Except as otherwise provided in subparagraphs (2) and (3) of this paragraph, no authorization will be granted for Class II facilities if the proposed facilities would radiate, during the 2 hours after local sunrise and the 2 hours before local sunset, toward any point on the 0.1 mv/m contour of a co-channel U.S. Class I station, at or below the pertinent vertical angle determined from curve 4 of figure 6a of §73.190, values in excess of those obtained as provided in paragraph (b) of this section.

REPLY BRIEF

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia United States Court of Appeals
of the District of Columbia Circuit

FILED DEC 1 1967

No. 21,180

Nathan J. Paulson
CLERK

JAMES RIVER BROADCASTING CORPORATION,

Appellant.

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

SUFFOLK BROADCASTERS,
KFAB BROADCASTING COMPANY,

Intervenors.

APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

LAUREN A. COLBY
1334 G Street, N.W.
Washington, D.C. 20004

Attorney for Appellant

(i)

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,180

JAMES RIVER BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

SUFFOLK BROADCASTERS,
KFAB BROADCASTING COMPANY,
Intervenors.

*APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION*

REPLY BRIEF

TABLE OF CONTENTS

I. REPLY TO BRIEFS OF INTERVENORS.....	1
II. REPLY TO BRIEF OF FEDERAL COMMUNICATIONS COMMISSION.....	2
A. The Decision of This Court in <i>Natick Broadcast As-</i> <i>sociates, Inc. v. FCC</i> Is Dispositive of the Instant Appeal	2
B. A Decision for Appellant Will in No Way Impede or Obstruct the Orderly Processing of Applications by the FCC	3
C. The Commission's Own Rules Did Not Provide for the Summary Return of Appellant's Application	8
D. Conclusion	11

TABLE OF AUTHORITIES

CASES:

<i>Bendix Aviation Corp. v. Federal Communications Commission</i> , 106 U.S. App. D.C. 304, 272 F.2d 533, <i>cert. denied sub nom.</i> <i>Aeronautical Radio, Inc. v. United States</i> , 361 U.S. 959 (1959)	9
<i>KXA, Inc. v. Federal Communications Commission</i> , D.C. Cir. Case No. 20,527, decided June 30, 1967	7
<i>Natick Broadcast Associates, Inc. v. Federal Communications</i> <i>Commission</i> , D.C. Cir., Case No. 20,834, decided Novem- ber 7, 1967.....	2, 3
<i>Pittsburgh Radio Supply House v. Federal Communications Com-</i> <i>mission</i> , 69 App. D.C. 22, 98 F.2d 303 (1938).	9
<i>Ranger v. Federal Communications Commission</i> , 111 U.S. App. D.C. 44, 294 F.2d 240 (1961)	3
<i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192 (1956)	9

ADMINISTRATION DECISIONS:

<i>Fine Music, Inc.</i> , 6 F.C.C.2d 186 (1966).	6, 7
<i>In the Matter of Application of WSTV, Inc.</i> , 8 Pike and Fischer R.R. 854 and 9 Pike and Fischer R.R. 175.	9

(iv)

<i>Molly Pitcher Broadcasting Company, F.C.C. File No.</i>	
BP-17,490.	7
<i>Report and Order re AM Station Assignment Standards 2 Pike</i>	
<i>and Fischer R.R. 2d 1658.</i>	10

RULES AND REGULATIONS OF THE FEDERAL COM-
MUNICATIONS COMMISSION, 47 CFR (1966):

Section 1.566(a).	8, 10
Section 1.571(j)(2)	5
Section 73.37.	8, 10
Section 73.187.	8

OTHER AUTHORITIES:

Annual Report of FCC for Fiscal Year 1966.	
---	--

Reply to Briefs of Intervenor

Most of the arguments advanced by Intervenor in their briefs will be answered in the portion of this Reply Brief directed to the Brief of the Federal Communications Commission. A few words should be said, however, regarding Intervenor's motivations in this proceeding.

Those motivations spring, of course, from self-interest. In the case of Suffolk Broadcasters, it is the desire of Suffolk to avoid having its 250 watt application for Suffolk—a small community which already has local radio service—compared through the hearing process with James Rivers' 50,000 watt wide-service-area application for Norfolk.

In the case of KFAB, although the Commission properly found that the amendment to Appellant's application cured the "daytime skywave" interference problem with KFAB, Intervenor nevertheless professes dissatisfaction with the amendment, and seeks a higher degree of protection.

Appellant does not for one moment suggest that Intervenor's motives in participating in this proceeding are the least bit improper. However, the nature of these interests needs to be clearly pointed out. These interests do not warrant denial of the relief requested by Appellant. Rather, if Suffolk Broadcasters thinks it has a meritorious application, it should be willing to have its application compared with Appellant's application on the merits of both proposals, in public hearing. As to KFAB, if it desires some additional degree of protection from interference, or thinks that Appellant has not provided all the protection to KFAB to which KFAB is entitled, its proper remedy is to ask the Commission to hear the question of the extent of the protection which must be provided to KFAB, at the hearing proceedings which should properly be held on the James River and Suffolk Broadcasters applications.

II

Reply to Brief of Federal
Communications Commission

A. The Decision of This Court in *Natick Broadcast
Associates, Inc. v. FCC* Is Dispositive
of the Instant Appeal

At the outset, it is respectfully submitted that the case of *Natick Broadcast Associates, Inc. v. FCC*, decided by this Court on November 7, 1967 (Case No. 20.834) is dispositive of this appeal, and plainly requires a grant of the relief sought by Petitioner.

In *Natick*, it will be recalled, an application was submitted which, like the application of James River, was apparently in compliance with all of the Commission's Rules, but which actually violated the prohibited overlap Rule because sufficient data had not been submitted to show the absence of such overlap.

It was not until the Commission processed the application of *Natick Broadcast Associates* that the error was discovered. Upon the discovery of the error, the Commission returned the application to the applicant. The applicant then resubmitted the application, together with new data conclusively establishing the absence of overlap, but the Commission refused to receive it because the new data had not been submitted until after the "cut off date".

This Court very properly held that the Commission's refusal to receive the application was "hypertechnical and arbitrary", and directed that the case be remanded to the Commission to determine whether the application, as amended, actually involved any Rule violation.

Here, as in *Natick*, Appellant's original application purported to show no violation of any Rule but, in actuality, such a violation existed as the result of an error in pattern design, resulting from failure to take into consideration a distant station entitled to protection from daytime skywave interference. But unlike the applicant in *Natick*, Appellant

discovered and corrected its mistake long, long before the Commission ever reached its application for processing. In fact, the mistake was corrected long before the Commission got around to returning the application. Thus, far from being distinguishable (as claimed by the Appellee and Intervenor), the instant case is even stronger than the *Natick* case, and cries out even more urgently for reversal of the Commission's arbitrary and high-handed actions.

**B. A Decision for Appellant Will in No Way Impede
or Obstruct the Orderly Processing of
Applications by the FCC**

The Commission errs when it argues that "permitting applicants to modify their proposals after the cut-off date has passed specifically to render their applications acceptable for filing . . . would return AM processing to the awkward, time-consuming and inequitable system whose unsatisfactory nature lead [sic] to the adoption of the cut off rule". In the first place, this case has little or nothing to do with the cut-off rule. Cut-off rules have been in effect since 1959, their validity has been upheld by this Court; and Appellant in no way challenges the cut-off rules. Those rules merely establish that an applicant must have his application on file in substantially complete form by a published cut-off date. Appellant did this. Unlike the applicant in the *Ranger* case, cited at Page 20 of the Commission's brief, whose application was grossly incomplete,¹ Appellant's application was complete in every way, and contained all the requisite sections and exhibits. And Appellant's complete application was submitted timely, *before* the cut-off date.

¹ A reading of the *Ranger* case will show that the application there involved contained no program schedule, and no dated partnership agreement; the applicant had failed to answer various questions; and had failed to submit required exhibits, including balance sheets, financial statements and earnings statements. Moreover, one of the exhibits the applicant *did* submit was dated after the date when the application was verified.

Secondly, there is no evidence that the harsh practices presently being followed by the Commission are any less "awkward and time consuming" than the practices followed by the Commission in former years, when it afforded applicants a greater degree of due process of law. Interestingly, in fact, the available evidence tends to show that it is the *present* system which is awkward and time consuming. Thus, in the fiscal years from 1949 through 1962, when the Commission was functioning under the old "awkward" system (wherein applications were only returned when they were actually patently defective on their face), the official statistics show that the Commission granted an average of about 150 applications per year. Just before the beginning of fiscal 1963, the Commission imposed a freeze on the acceptance of all applications for new AM stations. At the beginning of fiscal 1965, it lifted the freeze and adopted its new super-efficient "go-no-go" system. Strangely, however, it managed to grant only 60 applications in 1965, only 74 in 1966, and only 70 in fiscal 1967.² It would appear, therefore, that the super-efficiency of the "go-no-go" system may be more a matter of the Commission's imagination than a matter of actual fact.

The "horrible examples" of what will happen to the processing system if this appeal is allowed — cited at Pages 13-15 of the Commission brief — are farfetched and speculative. To those with even a remote familiarity with the processing system, the Commission's concern for the preservation of "predictability" as an element in the system is incongruous. For if there is one element which has been lacking from the Commission's system, it is predictability!

²The statistics cited here — with the exception of the figures for 1967, which were obtained by inquiry at the Commission — are reproduced in tabular form at Page 117 of the Commission's Annual Report for 1966. The complete tabulation of new AM grants for the period 1949 to date is as follows: 1949-200; 1950-194; 1951-116; 1952-60; 1953-187; 1954-148; 1955-161; 1956-197; 1957-232; 1958-132; 1959-159; 1960-92; 1961-178; 1962-147; 1963-129; 1964-80; 1965-60; and 1966-74.

Countless examples can be given of the unpredictability and inconsistency which have marked the administration of the system. A prime case in point involves one of the Intervenor in this very proceeding, Suffolk Broadcasters. The Suffolk Broadcasters application was filed on May 31, 1966, by Charles E. Springer. Subsequently, on June 28, 1967 (after the cut-off date), the application was amended to specify that the applicant would be composed of a partnership of Charles E. Springer and his wife. Thereafter, on September 27, 1967, and long after the cut-off date, the application was once again amended to provide that the applicant would be Rose Mae Springer. The Commission has a very clear and unequivocal rule, relating to the effect of amendments which change the ownership of an applicant. That Rule, which is Section 1.571(j)(2) of the Rules, states that:

"A new file number will be assigned to an application for a new station when it is amended to specify a change in ownership as a result of which one or more parties with an ownership interest in the original application do not have, on a collective basis, a 50% or more ownership interest in the amended application."

Here, the latest amendment to the Springer application brought about a situation in which the original sole party-in-interest to the application no longer has any interest whatsoever in the application. The quoted rule, therefore, required the assignment of a new file number to the application (which, of course, would require the application to be treated as a brand new proposal, late-filed after the cut-off date, and therefore, subject to dismissal). If predictability were an element of the Commission's processing system, the latest amendment to the Springer application would have manifestly required the assignment of a new file number and the rejection of the application. Predictably, however, the Commission acted unpredictably. For reasons which it never publicly enunciated, it chose to "wink" at the Rule and on

September 28, 1967, it released a public notice (*not* an "Order", as incorrectly stated in Intervenor's brief), quietly reporting the acceptance of the amendment without the assignment of any new file number.

As a matter of fact, the Commission frequently winks at its processing rules, when it wishes to be lenient. Another case in point is that of *Fine Music, Inc.*, 9 Pike and Fischer RR 2d 219 (1966). In *Fine Music*, the Commission, in order to avoid a forfeiture of hearing rights, on its own motion, waived the cut-off rule and, on the basis of new engineering data accepted an application previously rejected on electrical interference grounds. The operative facts are closely akin to those underlying this appeal.

In *Fine Music*, A tendered an application which was mutually exclusive with B's pending application which, in turn, was mutually exclusive, with C's pending application. However, at the time of A's tender, which occurred on B's cut-off date, C's cut-off date already had passed, and the Commission consequently rejected A's application on the ground of lateness because of the interlink between B and C. A's application contained engineering data designed to negate any such interlink but the Commission did not regard the data as persuasive. Thereafter, A retendered its application, together with new engineering data, which convinced the Commission that there had been no overlap between B and C at the time A first had tendered its application. However, since, as noted, A's initial tender had occurred on B's "cut-off" date, the retendered application also was unacceptable for filing on lateness grounds.

The Commission surmounted this obstacle by waiving the "cut-off" rule on its own motion. Its rationale was that the equities "argue forcefully for a waiver of the 'cut-off' rule and *nunc pro tunc* acceptance of . . . [C's] application."³

³ Appellee's efforts to distinguish *Fine Music* (Page 27 of Appellee's brief) are unavailing. The applicant in *Fine Music* was required to show that his application wouldn't cause any electrical interfer-

Still another example of the Commission's selective enforcement of its processing rules is afforded by the Commission's action, taken on February 16, 1967, accepting for filing (File No. BP-17,490) the application of Molly Pitcher Broadcasting Company for a new station at Freehold, New Jersey. As in the instant situation, the Molly Pitcher application, as originally tendered on the cut-off date, showed no electrical interference or overlap with any existing station. Actually, however, as pointed out in petitions thereafter filed by competing applicants, the proposal involved electrical interference to a station in Hartford, Connecticut. In response to the petitions, Molly Pitcher conceded the overlap, but tendered an engineering amendment, changing its directional pattern to eliminate it. Although the amendment was tendered long after the original cut-off date, the Commission, without explanation, subsequently accepted the application for filing.

Before leaving the subject of "predictability", it is worth noting that even if one could predict when the Commission is going to return an application and when it is not (and, as we have shown, it would take a swami with a crystal ball to do this), there would still be no complete predictability in the system. For, as the Commission concedes at Footnote 9 on Page 17 of its brief, "Acceptable applications, of course, have always been permitted to amend so long as no new conflicts were created or the amendment did not

ence to anyone and the application, as tendered, failed to make the requisite showing. Similarly, the applicant in James River was required to show absence of electrical interference but its application, as originally tendered, failed to make the requisite showing. The device used to clear up the interference problem in the *Fine Music* case was field intensity measurements; in the instant case, it was a very small change in directional pattern. The significant fact is that the interference was, in both cases, removed by amendment of the applications. But, the Commission's tender treatment of *Fine Music's* amendment contrasts markedly and inexplicably with its treatment of James River's amendment.

change the basic nature of the proposal". Thus, the sea of applications pending at the Commission is in constant motion, as amendments are filed to various engineering proposals. The allowance of such amendments is perfectly proper and serves the public interest, since it allows and even encourages applicants to improve their proposals, so as to better serve the public.

**C. The Commission's Own Rules Did Not
Provide for the Summary Return of
Appellant's Application**

By their lengthy discussions of the supposed great importance of the daytime skywave rule (Section 73.187) and by their efforts to distinguish it from other rules, such as the rule requiring site photographs — which are claimed to be of "trifling" importance — Appellee and Intervenor left-handedly concede the point that the Commission normally does not return applications whenever they violate a rule, but only when they violate certain special rules, such as Section 73.37, which specifically states that an application will not be *accepted* for filing if it violates the Rule. These rules which provide for outright rejection of applications not meeting their requirements are known as "go-no-go" rules, and they at least purport to give applicants clear notice that their applications will be returned if they don't comply with the standards imposed by the rules. But Section 73.187 of the Commission's Rules doesn't say anything about non-acceptance of applications and — contrary to the unsupported statement at Page 26 of the Commission's brief — Appellant knows of no other case in which an application has been returned without hearing, for violation of Section 73.187.

Appellee and Intervenor claim that there is a "catch-all" rule, Section 1.566(a) of the Rules, which justifies the Commission's actions (see Page 8 of Commission brief). But their reliance on Section 1.566(a) is misplaced. Speaking of that Rule, the Commission itself has said that "It is applicable only to applications which, because of the nature of the

particular rule involved, can be patently seen to be in conflict with the Rule (e.g., minimum mileage separation requirements for television stations, limitation on the number of stations to be commonly owned) (see, *In the matter of the Application of WSTV, Inc.*, 8 Pike and Fischer RR 854, 9 Pike and Fischer RR 175)". See Report and Order effective November 13, 1953, 18 FR 7195, quoted in Pike and Fischer RR Current Service, Page 51:282.

Thus, Section 1.566(a) of the Rules – permitting the return of applications *patently* not in accordance with the Commission's Rules, regulations or requirements – applies only to situations such as those involved in the trilogy of cases cited at Page 21 of the Commission's brief, where an applicant is intentionally and deliberately applying to use radio-positioning equipment in a frequency band not allocated for such purposes;⁴ or applying to acquire the ownership of a sixth television station in the face of a rule clearly restricting the number of stations which he may own to five;⁵ or applying for a 5,000 watt radio station on a channel where the maximum power permitted is 1,000 watts.⁶ Such applications, on their face, involve an intentional effort to apply for something not permitted by the rules, and the Courts have, as the Commission points out, properly held that the Commission has the right to reject them without hearing.⁷

⁴*Bendix Aviation Corp. v. FCC*, 106 U.S. App. D.C. 304, 272 F.2d 533 (1959).

⁵*U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

⁶*Pittsburgh Radio Supply House v. FCC*, 69 App. D.C. 22, 98 F.2d 303 (1938).

⁷The *KXA* case, mentioned by Appellee on Page 23 of its brief, is another in the same line of cases, involving as it did, an application to use a frequency which was simply not available for the purposes intended by the applicant.

But, James River's application was by no means defective on its face. It was applying for a 50,000 watt standard broadcast facility on a frequency where such facilities are plainly permitted by the Commission's Rules; and it was obvious that James River intended its application to fully comply with all of the rules, and that any failure to comply with the daytime skywave protection requirements must perforce have been the result of simple error.

Section 1.566(a) of the Rules has been on the books since at least 1958. If, as the Commission now contends, the Rule was designed to permit applications to be returned even where, as here, a defect was not obvious and resulted from simple error, it would scarcely have been necessary for the Commission to amend Section 73.37 of the Rules in 1964, to specifically provide for the return of applications involving certain types of engineering deficiencies. But the Commission *did* make such an amendment of Section 73.37 of the Rules⁸ because, clearly, it did not consider that the "catch all" provisions of Rule 1.566(a) provided it with the authority it needed to turn back at the threshold applications which, while they might involve unintentional and readily curable violations of this or that standard, are not, *on their face*, "patently in conflict with the Commission's Rules, regulations or other requirements".

⁸By Report and Order adopted in July, 1964, in Docket No. 15,084, 2 Pike and Fischer RR 2d 1658. See, in particular, Page 1660 for a discussion of the "go-no-go" concept and an enumeration of the standards to which it was to be applied (which did *not* include the daytime skywave standard).

D. Conclusion

In conclusion, entirely aside from everything else, the Commission's actions in this case should be reversed, simply because they were arbitrary and capricious. Appellant timely submitted a complete application for a new standard broadcast station. Buried in the mountain of engineering material the Appellant was required to submit, there was a mistake; a failure to take into account the interference protection requirements to a distant station. Appellant promptly corrected the mistake before the Commission took any action on Appellant's application. It was simply arbitrary and hypertechnical for the Commission to refuse to consider the correction, where the application, when reached for processing, had been amended, pursuant to rules specifically permitting such amendments, to fully correct the error.

Respectfully submitted,

JAMES RIVER BROADCASTING
CORPORATION

LAUREN A. COLBY
Its Attorney